DBD CV-08-4008817-S

MSW ASSOCIATES, LLC

V.

PLANNING COMMISSION OF DANBURY

SUPERIOR COURT

JUDICIAL DISTRICT

OF DANBURY

AUGUST 8, 2014

MEMORANDUM OF DECISION

I

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On September 25, 2007, the plaintiff, MSW Associates, LLC, filed its original application for a special permit and for site plan approval with the defendant, the Planning Commission of the City of Danbury (Planning Commission) for the construction of a waste transfer station, a weighing station, and outdoor storage areas at 16 Plumtrees Road, Danbury, Connecticut. At the time of the applications, the property on which these structures were to be constructed was located within the IG-80 zone, wherein a transfer station could only be constructed by special exception.[1] The land surrounding the proposed site included a multi-family public housing facility that is owned by the City of Danbury Housing Authority, the City of Danbury water treatment plant, Dell's Auto Wrecking to the south and Putnam Automotive. After three days of hearings that ran from December, 2007, through January, 2008, the defendant Planning Commission denied the plaintiff's applications on April 2, 2008 and notice of this denial was

[1] The Danbury Zoning Regulations subsequently removed transfer stations from its list of permitted special exceptions for the IG-80 zone, however, the plaintiff's application was filed before this change went into effect.

published on April 11, 2008.

On May 8, 2008, the plaintiff filed this administrative appeal from the denial of its application for a special exception permit and site plan approval by the defendant Planning Commission. The plaintiff attached a return of service to its appeal that established that the appeal was timely served on the defendant on April 24, 2008. Of note is that in its original appeal, the plaintiff claimed that it was the owner of the property situated at 16 Plumtrees Road, the subject of the application. On July 8, 2008, the plaintiff filed an amended appeal and the defendant Planning Commission filed its answer on December 7, 2009. On June 7, 2010, the plaintiff filed its first brief, wherein it argued that the defendant Planning Commission's denial of its applications should be overturned because such denial was not supported by substantial evidence in the record. On August 16, 2010, the defendant Planning Commission filed a responsive brief, wherein it argued that none of the plaintiff's arguments provided a basis for overturning its denial, as the decision of the defendant was based on substantial evidence in the record and was not unreasonable, arbitrary, or illegal.

On March 5, 2014, this court heard argument on the matter, and ordered the parties to file two post-trial briefs, one on the voluminous cases and materials cited during the hearing which were not in the briefs previously filed, and a separate brief on the issue of aggrievement, as the parties disputed at oral argument that the plaintiff was aggrieved. In addition, on March 27, 2014, the plaintiff filed a second request to amend the appeal in which it sought to add additional language to clarify its standing on the issue of aggrievement. The motion to amend the appeal was granted by this court as it conformed to proof offered at the March 5, 2014 hearing.

II

AGGRIEVEMENT

In an issue not raised until March 5, 2014, at oral argument on this administrative appeal, the defendant Planning Commission contends that the plaintiff had failed to plead and prove aggrievement. The defendant Planning Commission contends that in plaintiff's July 8, 2008 amended appeal, the plaintiff alleged that it was the "owner of the property situated at 16 Plumtrees Road [Danbury Connecticut] that was the subject of the . . . applications" for special exception and site plan approvals at issue in this appeal." The defendant Planning Commission cites to the July 8, 2008 amended appeal and plaintiff's sole allegations of aggrievement that "plaintiff is aggrieved by the Commission's decision in that it was the owner of the property involved in the Applications and was the unsuccessful applicant."

At the hearing on this administrative appeal, the plaintiff offered evidence through Joseph Putnam, a managing member of MSW Associates, LLC and the principal member of Putnam Properties, LLC, which is the owner of 16 Plumtrees Road. Mr. Putnam testified at the hearing as to the status of plaintiff as the owner of the subject property and as to plaintiff's status as a holder of a credible oral agreement with Putnam Properties, LLC to become either the owner of 16 Plumtrees Road or a long term tenant should the permits sought in the special permit and site plan applications be obtained. After the hearing, the plaintiff moved to amend its appeal to conform to the proof offered at the hearing. The plaintiff did not move to substitute a party, but conformed the amended appeal to the evidence adduced at the hearing on aggrievement. The court notes that at no time prior to the March 5, 2014hearing did the defendant Planning Commission raise any claim with respect to issue of aggrievement. The motion to amend the

appeal to conform to the proof offered at the hearing was granted by this court.

"Pleading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal." (Internal quotation marks omitted.) *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 537-38, 833 A.2d 883 (2003). "Pursuant to General Statutes § 8-8(b) . . . any person 'aggrieved' by a decision of a municipal planning or zoning commission may appeal to the Superior Court." *Brookridge District Assn.* v. *Planning & Zoning Commission*, 259 Conn. 607, 612, 793 A.2d 215 (2002). The Supreme Court has created a basic test to determine a party's status pursuant to General Statutes § 8-8. "The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 394, 941 A.2d 868 (2008). "In order to prevail on the issue of aggrievement, [t]he trial court must be satisfied, first, that the plaintiff alleges facts which, if proven, would constitute aggrievement as a matter of law, and second, that the plaintiff proves the truth of those factual allegations." (Internal quotation marks omitted.) *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals,* supra, 266 Conn. 542.

Both the defendant Planning Commission and the plaintiff contend that the owner of the property in question is Putnam Properties, LLC. This fact is undisputed. However, the plaintiff was created prior to 2007, and was the entity that filed the application for the special exception and site plan permits. (Return of Record (ROR) 2, part 1). The sole member of Putnam Properties, LLC is Joseph Putnam who is also the managing member of the plaintiff. The plaintiff presented evidence at the March 5, 2014 hearing that it was created for the purpose of applying for permits and building the facility on the subject property. The plaintiff offered evidence at the March 5, 2014 hearing that it and Putnam Properties had an oral agreement that once the necessary permits were obtained, the plaintiff would become the owner or long-term lessee of the property. The plaintiff contends that it was classically aggrieved as it had the expectation of being the owner-operator of the facility and, therefore, had a personal stake in the property as well as a colorable claim that it would suffer injury as a result of the denial of the permits.

The defendant Planning Commission argues that the record shows that both the special permit and the site plan applications list the owner of the property in question as Putnam Properties, LLC and both applications were signed by Joseph Putnam as the agent of Putnam Properties, LLC. (ROR 2, part 1). In light of this, the defendant Planning Commission argues that the plaintiff failed to prove that it was the owner of the property and that its status as an unsuccessful applicant before the commission is insufficient to establish standing. However, a review of ROR 2 cited by the defendant Planning Commission, clearly shows that the applications for the special permit and site plan approval were signed and filed by Joseph Putnam on September 25, 2007, not as an agent of Putnam Properties, LLC, but as a member of MSW

Associates, LLC. Notwithstanding the foregoing misinterpretation of the record, the defendant Planning Commission concedes that in some cases, an oral agreement between a property owner and a non-owner developer can establish the non-owner developer's aggrievement in a zoning appeal. It nevertheless argues that Joseph Putnam's testimony at the hearing regarding the "informal and ill-defined understanding" between the plaintiff and Putnam Properties, LLC, was not an agreement sufficient to confer a specific interest on the plaintiff to establish aggrievement.

In *Moutinho* v. *Planning & Zoning Commission*, 278 Conn. 660, 668, 899 A.2d 26 (2006), the Supreme Court addressed the issue at hand here, which is "whether a party who has an oral agreement to lease property after the fulfillment of a contingency may be aggrieved by a land use decision affecting the property." The Supreme Court held that "an agreement between a landowner and a non-owner developer need not be in writing to establish the developer's aggrievement in a zoning appeal. When the evidence establishes the existence of an oral agreement and the intent of the parties to abide by that agreement, a substantial and legitimate interest in the property exists." (Internal quotation marks omitted.) Id., 669-70.

In the present case, the facts are similar to those in *Moutinho*. The operative amended appeal states that the plaintiff is aggrieved in that: "by virtue of its credible oral agreement to acquire the property in fee or by long-term lease, and having been created to become the applicant for, and developer, owner and operator of, the facility for which the Applications were filed, which ownership and operation was to be for its own profit and account, was the party in interest in the Applications, and it has a specific, personal, legal interest in the aforesaid property and that specific, personal legal interest in the aforesaid property has been specially and injuriously affected by the denial of the permits sought in the Applications, because Plaintiff will

have lost its substantial investment in the cost of obtaining same, and will be deprived of obtaining the permits and right to operate said facility and the earnings and profit that would have flowed therefrom, but for the denial." (Plaintiff's Amended Appeal, Docket No. 132, p. 6.) This court finds that Joseph Putnam's credible testimony at the March 5, 2014 hearing was consistent with these allegations.

Based on the foregoing, this court finds that the plaintiff has both pleaded in the operative appeal, as well as proven through testimony at the March 5, 2014 hearing, that it had an oral agreement with Putnam Properties, LLC to become the owner or long-term lessee of the property at issue upon the obtainment of the required permits. Just as in *Moutinho*, the plaintiff in this action had an oral agreement with the landowner regarding an interest in the property that was contingent upon the favorable award of the required permits. Consequently, this court finds that the plaintiff has a specific, personal, and legal interest in the property and, accordingly, that the plaintiff is classically aggrieved.

III

DENIAL OF SPECIAL PERMIT APPLICATION

The plaintiff contends that the defendant Planning Commission's denial of its special permit application must be overturned because the denial is not supported by substantial evidence in the record.

"A special exception is also known as a special permit . . . and whether a zoning board grants a special permit essentially is a discretionary process. . . . A special permit allows a property owner to use his property in a manner expressly permitted by local zoning regulations. . . . The proposed use, however, must satisfy standards set forth in the zoning regulations

themselves as well as the conditions necessary to protect the public health, safety, convenience and property values. . . . An application for a special permit seeks permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular zoning district." (Citations omitted; internal quotation marks omitted.) *Oakbridge/Rogers Ave. Realty, LLC* v. *Planning & Zoning Board*, 78 Conn. App. 242, 245-46, 826 A.2d 1232 (2003).

"The basic rationale for the special permit . . . is that while certain land uses may be generally compatible with the uses permitted as of right in a particular zoning district, their nature is such that their precise location and mode of operation must be individually regulated because of the particular topography, traffic problems, neighboring uses, etc., of the site. . . . When ruling upon an application for a special [permit], a planning and zoning board acts in an administrative capacity. . . . Generally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. The [Appellate Court and] trial court [must] decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal. . . . Although a zoning commission or board possesses the discretion to determine *whether* a proposal meets the standards established in the regulations, it lacks the discretion to deny a special permit if a proposal satisfies the regulations and statutes. . . . [G]eneral considerations such as public health, safety and welfare, *which are enumerated in*

zoning regulations, may be the basis for the denial of a special permit." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Oakbridge/Rogers Ave. Realty, LLC* v. *Planning & Zoning Board*, supra, 78 Conn. App. 246-47.

"[C]ourts are not to substitute their judgment for that of the board, and . . . the decisions of local boards will not be disturbed as long as honest judgment has been reasonably and fairly made after a full hearing. . . . The trial court's function is to determine on the basis of the record whether substantial evidence has been presented to the board to support [the board's] findings. . . . [E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . Where the board states its reasons on the record we look no further. . . . More specifically, the trial court must determine whether the board has acted fairly or with proper motives or upon valid reasons. . . . We, in turn, must determine whether the court properly concluded that the board's decision to [deny the application for a special permit] was arbitrary, illegal or an abuse of discretion. . . . The evidence, however, to support any such [decision] must be substantial." (Citations omitted; internal quotation marks omitted.) Id., 247-48.

"This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The United States Supreme Court, in defining substantial evidence in the directed verdict formulation, has said that it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . . The

reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Internal quotation marks omitted.) *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 588, 628 A.2d 1286 (1993).

"Where a zoning authority has stated the reasons for its action, a reviewing court may only determine if the reasons given are supported by the record and are pertinent to the decision." (Internal quotation marks omitted.) *Spectrum of Connecticut, Inc.* v. *Planning & Zoning Commission*, 13 Conn. App. 159, 163-64, 535 A.2d 382, cert. denied, 207 Conn. 809, 540 A.2d 373 (1988). "Where a zoning agency has stated its reasons for its actions . . . [its decision] must be sustained if even one of the stated reasons is sufficient to support it."(Internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 544, 600 A.2d 757 (1991).

The applications at issue in this administrative appeal are applications for a special exception and for site plan approval pursuant to Danbury Zoning Regulation § 10.C.4 in effect as of December 2007, when plaintiff filed its applications. Danbury Zoning Regulations § 10.C.4.b.1 require that "[a]pproval of a petition for special exception, or approval with conditions attached, shall include approval of a site plan submitted at the time of the petition, modified as necessary to include all conditions lawfully required by the Planning Commission." On September 25, 2007, the plaintiff applied for a special exception permit to construct a municipal solid waste transfer station and volume reduction facility in an IG-80 industrial zone. The purpose of an IG-80 zone was set forth in the Danbury Zoning Regulations as a zone "to

provide an area of manufacture, assembly, and product processing of a more general industrial nature than permitted in the IL-40 district. Large lot areas are required to provide an appropriate buffer for the heavy industrial uses that are permitted. This district is also appropriate for planned industrial uses organized in an industrial park setting in suburban locations."

Section 10.C.4 of the Danbury Zoning Regulations in effect at the time the plaintiff filed this application, provided that "[n]o petition for a special exception or special permit shall be granted unless such petition is in compliance with all provisions of these Regulations including, but not limited to, all requirements specified for the appropriate zoning district, all requirements for an overlay zone and supplemental regulations, as applicable, and all additional requirements specific to the special exception or special permit." Those additional requirements were defined in § 10.C.4.a as "no special exception or special permit shall be approved unless the Planning or Zoning Commission, respectively shall have found that the proposed use: (1) will not emit noise, smoke, glare, odor, or vibration or other conditions which will create a nuisance having a detrimental effect on adjacent properties; (2) is designed in a manner which is compatible with the character of the neighborhood; (3) will not create conditions adversely affecting traffic safety or which will cause undue traffic congestion; and (4) will not create conditions harmful to the natural environment or which will jeopardize public health and safety.

In this case, the plaintiff made an extensive presentation over several days in support of its special permit and site plan applications to the defendant Planning Commission. The record is clear that in its resolution of denial, the Planning Commission was unable to make the above required findings set forth in § 10.C.4 .a of the Danbury Zoning Regulations. The plaintiff contends that there was not substantial evidence in the record to support the defendant Planning

Commission's findings and that the defendant Planning Commission's denial was arbitrary, illegal or an abuse of discretion. The defendant Planning Commission conversely argues that the record reflects that substantial evidence supported the denial of the plaintiff's special permit and site plan applications and such denial was not arbitrary, illegal or an abuse of discretion..

A. Commission's Denial of Special Permit Based on Noise

Section 10.C.4 of the Danbury Zoning Regulations states, in relevant part, that "[i]n addition to the requirements specified above, no special exception or special permit shall be approved unless the Planning Commission or Zoning Commission, respectively, shall have found that the proposed use: (1) will not emit noise, smoke, glare, odor, or vibration or other conditions which will create a nuisance having a detrimental effect on adjacent properties . . . ."

In its April 2, 2009 denial of the plaintiff's special permit application, the defendant Planning Commission states that it requested a "cumulative noise assessment regarding the interior facility operations and the inherent noise associated with trucks as they awaited entry to the building, accelerated and maneuvered through the site as well as activities undertaken outside the building. Additional testimony by the applicant indicated it measured noise levels resulting from the operation of equipment on the adjacent site of Putnam Automotive. The applicant's expert extrapolated his noise findings to the project site, which it described as using similar equipment. It is the applicant's position that the facility as designed, the walls that surround the facility, and the landscaping proposed at full maturity will reduce any increase in noise to background levels. The Planning Commission respectfully disagrees. If finds that a succinct and definitive noise assessment study was not submitted by the applicant to support its position. Rather, the Planning Commission considers the testimony of the applicant's expert to be not only

confusing, but unsubstantiated." (ROR 41, p 9.) The defendant Planning Commission found that the applicant did not "present sufficient documentation and analysis to sustain its position and failed to consider the cumulative impact of operational noises on adjacent uses." (ROR 41, p. 9.) The defendant Planning Commission found that "based on the record and its own experiences and observations, it could not find that the proposed use of the site, including both interior and exterior operations, will not result in noise levels creating a nuisance having detrimental effect on adjacent properties, specifically the adjacent residential uses." (ROR 41, p. 9.)

In response to the denial, the plaintiff contends that a denial on this basis is unsupported by the evidence, particularly since its expert's readings related to daytime hours, which are known to be 8 a.m. to 8 p.m., and that this information was included in the expert's report. The plaintiff cites to the "*Pestey* test" from *Pestey* v. *Cushman*, 259 Conn. 345, 788 A.2d 496 (2002), as the appropriate standard to determine if something is a nuisance, and argues that the defendant Planning Commission needed to determine that the noise levels constituted a nuisance under that test. Further, the plaintiff contends that the defendant cannot consider noise as a reason for denial, pursuant to a municipal ordinance, unless that ordinance had been approved by the State of Connecticut Commissioner of Environmental Protection and the Danbury noise ordinance in the regulations lacked this approval at the time that the defendant Planning Commission issued its denial.

In reply, the defendant Planning Commission argues that the plaintiff stated that the hours of operation of the proposed transfer station would actually begin before 8 a.m., and that while the maximum allowable dBA at that time of day is forty-five dBA, the plaintiff's expert, stated that the expected dBA at that time is forty-seven dBA. The defendant Planning Commission

contends, therefore, the level of noise that would be produced was not within the allowable limits of the Danbury Noise Ordinance. The defendant Planning Commission cites to § 12-14 (e) of the City of Danbury Noise Ordinance, which it claims allows the emission of noise that will not have a level of more than fifty-five dBA for an adjacent residential receptor during "daylight hours" of 8 a.m. to 8 p.m., and contends that under these regulations the allowable level of emitted noise before 8 a.m. is forty-five dBA. (Def. 8/16/2010 Br. pp. 10-11.) In addition, the defendant Planning Commission argues that while "daytime hours" noise measurements taken by the plaintiff's expert, the time of day that these measurements were taken was not established and they could not be considered background noise levels at various times of the day. (ROR 41, p.9.) Finally, the defendant Planning Commission contends that this court should not accept the plaintiff's definition of a "nuisance," as this definition would lead to unworkable results and would spawn further issues, such as whether to identify a nuisance as public or private and whether the court would need to consider the issue of damages. Instead it argues this court should accept the Merriam Webster's Dictionary definition which defines "nuisance" as "a person, thing or situation that is annoying or that causes trouble." Webster's Third New International Dictionary (2002); (Def. Post-Trial Br p. 5.) The defendant contends that it interpreted "nuisance" in § 10.C.4.a.1 of the Danbury Zoning Regulations in accordance with this dictionary definition.

"Although the position of the municipal land use agency is entitled to some deference . . . the interpretation of provisions in the ordinance is nevertheless a question of law for the court. . . . The court is not bound by the legal interpretation of the ordinance by the [commission]. . . .The words used in zoning ordinances are to be interpreted according to their usual and natural

meaning and the regulations should not be extended, by implication, beyond their expressed terms." (Citations omitted; internal quotation marks omitted.) *Northeast Parking, Inc.* v. *Planning & Zoning Commission*, 47 Conn. App. 284, 293, 703 A.2d 797, cert. denied, 243 Conn. 969, 707 A.2d 1269 (1998). An agency's interpretation of regulations is given deference "only when the agency has consistently followed its construction over a long period of time, the [regulatory] language is ambiguous, and the agency's interpretation is reasonable." (Internal quotation marks omitted.) *Egan* v. *Planning Board*, 136 Conn. App. 643, 652, 47 A.3d 402 (2012). In *Egan*, the Appellate Court found that the planning board of Stamford had not engaged in a long-standing, time-tested practice of defining a term a certain way, and further found that the planning board did not cite any prior judicial interpretation of the zoning regulation. Id., 652. They, therefore, concluded that they would accord no special deference to the planning board's interpretation of the term, and went on to define the term according to its common meaning. Id., 652-54.

Just as in *Egan*, the defendant here, while submitting a competing definition of the term "nuisance" to the plaintiff's proposed interpretation, has not cited any prior interpretations that it has made of the term nuisance as it applies to noise and odor issues. Accordingly, this court will accord no special deference to the defendant's interpretation of the term nuisance, but rather will follow the Supreme Court's holding in *Pesty* v. *Cushman*, supra, 259 Conn 345, with respect to what constitutes a private nuisance. In *Pesty,* the Supreme Court held that a plaintiff in a private nuisance action must demonstrate that: (1) the defendant acted with intent of interfering with the plaintiff's use and enjoyment of his or her property; (2) the interference with the use and enjoyment of the land was of the kind intended; (3) the interference was substantial; and (4) the

interference was unreasonable. Id., 358.

In *Walsh* v. *Stonington Water Pollution Control Authority,* 250 Conn. 443, 457, 736 A.2d 811 (1999), the Supreme Court rejected the defendant's argument on appeal that its operation of a wastewater treatment plant could not constitute a nuisance since the operation of such a plant was clearly a reasonable use of the property. Id., 457. The Supreme Court held that the production of odors by the defendant's plant could constitute a nuisance, notwithstanding the fact that operating a wastewater treatment plant was clearly a reasonable use of the property in question. Id. In *Pesty*, the Supreme Court held that while the "proposition was not stated expressly in *Walsh*, our holding in that case demonstrates that while the reasonableness of a defendant's conduct is a factor in determining whether an interference is reasonable, it is *not* an independent element that must be proven in order to prevail in all private nuisance causes of action. The inquiry is cast more appropriately as whether the defendant's conduct unreasonably interfered with the plaintiff's use and enjoyment of his or her land rather than whether the defendant's conduct was itself unreasonable." (Emphasis in original.) *Pesty* v. *Cushman*, supra, 259 Conn. 360.

This court will use the Supreme Court's definition of the term "nuisance" in *Pesty* when evaluating whether substantial evidence was presented to the defendant to support its findings that the noise emanating from the proposed project would constitute a nuisance.

The plaintiff has argued on this appeal that the defendant Planning Commission could not use the City of Danbury Noise Ordinance as a grounds for the denial of its special permit application as such noise ordinance had not been approved by the Commissioner of Environmental Protection. In *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, 76

Conn. App. 199, 821 A.2d 269 (2003), a property owner sought approval of a site plan for a go-cart track. The Planning Commission denied the application in part based on a zoning regulation that purported to regulate issues of noise. Id., 201. On appeal, the Appellate Court found that the noise regulation was invalid, noting that the Connecticut legislature has codified statutes governing noise pollution in General Statutes § 22a-67 et seq. Id., 216. Section 22a-67 provides, in relevant part,"(1) excessive noise is a serious hazard to the health, welfare and quality of life of the citizens of the state of Connecticut" and . . . (4) the primary responsibility for control of noise rests with the state and political subdivisions thereof . . . ." The Appellate Court in *Berlin* held that "[t]he scheme empowers the commissioner of environmental protection to develop, adopt, maintain and enforce a comprehensive state-wide program of noise regulation as well as to work with local governments in their efforts to abate noise pollution." (Internal quotation marks omitted.) *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, supra, 76 Conn. App. 216. The Appellate Court noted that "[t]he legislature further provided, in regard to municipal noise ordinances, that [n]o ordinance shall be effective until such ordinance has been approved by the commissioner [of environmental protection]." (Internal quotation marks omitted.) Id. The court held that the legislature's regulation of how a municipality could adopt a noise regulation indicated that it had preempted the field and, in that regard, that the noise regulation at issue, as it had not been approved by the Commissioner, was an invalid basis for the commission to reject the application. Id., 217. The Appellate Court stated "[f]or those reasons, we conclude that the court properly deemed . . . the regulations to be ineffective and properly concluded that the commission could not rely on the regulation in denying the site plan application." Id., 219.

In the present appeal, the plaintiff has raised the issue of the effectiveness of the noise

regulation, stating that the record does not reflect whether this regulation was submitted to the Commissioner of Environmental Protection as required by statute. The plaintiff does provide a letter in its first post trial brief, dated May 29, 2012, wherein the Commissioner formally approved the noise regulation. The date of the letter suggests that at the time of the defendant *Planning* Commission's April 2, 2008 denial of the plaintiff's application the noise regulation had not yet been approved by the Commissioner. The defendant Planning Commission has not offered any evidence contrary to this position

Just as the Planning Commission in *Berlin Batting Cages* could not use its noise regulation to deny an application, the defendant Planning Commission in the present matter cannot use its 2008 noise ordinance to deny the plaintiff's application as it had not yet been approved by the Commissioner of Environmental Protection, as required by statute. Therefore, the court finds it cannot uphold the defendant's denial of plaintiff's special permit application on the ground it violates the Danbury Noise Regulations.

As the primary basis for the defendant Planning Commission's denial of plaintiff's special permit application on noise was the Danbury Noise Ordinance, the court finds that there was not substantial evidence in the record to support its denial of plaintiff's special permit application pursuant to § 10.C.4.a.(1) of the Danbury Zoning regulations on the grounds that the proposed transfer station site would produce noise levels creating a nuisance having a detrimental effect on adjacent properties. The court further finds that the denial was arbitrary in light of the above noise ordinance requirements. Accordingly, the defendant Planning Commission's denial of plaintiff's special permit application on such grounds is overturned.

B. Commission's Denial of Special Permit based on Odor

The plaintiff next argues that the defendant Planning Commission's denial of its special permit application on the grounds that the proposed site would result in odors that would create a nuisance having a detrimental effect on adjacent properties is not supported by substantial evidence in the record and must be overturned.

In its denial, the defendant Planning Commission states that "the applicant acknowledges that the operations within the building will emit odors. Such odors are inherent in the handling of municipal solid waste, recyclables and construction and demolition debris. To mitigate odors emanating from operations interior to the facility, the applicant proposes installation of an odor management system for the facility. The system is proposed to utilize filter for particulate matter, activated carbon impregnated with potassium permaganate for odors and ultra violet light for virus and bacteria. It is the applicant's position that such a three tier system as proposed is 'state of the art.' The applicant's experts have provided written testimony that they are not familiar with any solid waste handling facility currently operating that uses an odor management system that provides for particulate, odor and bacteria/virus capture and treatment to prevent these elements from migrating off the site. The Planning Commission concurs that a system as proposed is complex and may significantly reduce odors inside the structure. It also notes, however, that the maintenance protocol is untested. While the proposed odor management system may reduce odors emanating from the operations within the building, the Planning Commission, based on its experience with solid waste transfer stations that handle municipal waste and heavy vehicles transporting such waste, finds that odors are likely to result from said activities and that such odors can be smelled off-site. The Planning Commission finds that these

odors create a nuisance having a detrimental effect on adjacent properties. The applicant has provided no testimony relative to the control of odors emanating from idling vehicles loaded with decomposing solid waste nor did it sufficiently address odors from transfer trailers relocated from inside the structure to the northwest corner of the site awaiting export. . . . the Statement of Operations plan submitted by the applicant provided for mulch to be placed on top of transfer trailers containing municipal solid waste that are stored on the site. There is no evidence in the record that use of mulch will reduce odors. In addition, the Planning Commission notes that decomposing wood products also emit odors. The Planning Commission finds that the applicant did not present sufficient documentation and analysis to sustain its position and failed to consider odors emanating from storage containers. In fact, the applicant's air system expert testified that transfer trailers stored will likely emit odors beyond the project site property lines due to decomposing municipal solid waste especially when air temperatures exceed 90 degrees. The Planning Commission notes its experience with the existing transfer station on White Street in Danbury and agrees that during summer months, and at other times of the year, the operations at that facility emit odors which the Planning Commission finds offensive and a nuisance to adjacent properties. Therefore, based on the evidence in the record and its own experiences, the Planning Commission cannot find that the proposed use of the site will not result in odors that will create a nuisance having a detrimental effect on adjacent properties, specifically adjacent residential uses." (ROR 41, p. 10.)

The plaintiff argues that there is no basis in the record to support the defendant's denial of its special permit application based on odor, as the only expert testimony on the record came from the plaintiff's expert who testified that no odor would escape the facility, even when the

doors to the facility are open. The plaintiff also argues that its odor expert testified at length that the odors of transitory vehicles would be managed with masking agents. However, the plaintiff's odor expert did testify that "odors are subjective. That's the problem; you can smell something at a much lower threshold than I could. There really is no mechanism to measure odors; there is detection, but no measurement. That's the subjective part of odor." (ROR 51, 1/2/08 Tr. p. 6.) The plaintiff also contends that the defendant Planning Commission cannot rely on its own experience at the White Street transfer station, only on the knowledge of the commission members through personal observation of the site, and only if this information is in the record.

In response, the defendant Planning Commission contends that there is no evidence in the record regarding any testing of the plaintiff's "state of the art" protocol. It further argues that it raised several issues regarding odors that could arise from activity outside of the proposed facility, as well as that the proposed facility had five storage slots for the storage of tractor trailers that would be filled with waste, and that the plaintiff admitted on the record that not all of these trailers would be removed immediately. The defendant further contends that the plaintiff offered testimony that these trailers would be covered in mulch, but offered no evidence that this would contain the odors, and contends that the plaintiff's expert's testimony was far from reassuring, noting two times in the record where the expert could not answer the defendant's questions regarding potential odor issues.

In *Torsiello* v. *Zoning Board of Appeals*, supra, 3 Conn. App. 47, the Appellate Court held that when a commission relies on its personal observations of a site and relies on these observations, that information must be in the record, because "the court must determine the correctness of the conclusions from the record on which they are based. . . . That record includes

knowledge acquired by board members through personal observation of the site." (Citation omitted) Id., 49-50. In addition to its own observations of a site, "[t]he commission [i]s entitled to take into account its own knowledge of the local conditions, and the burden rest[s] on the plaintiff to show that the commission acted improperly." (Internal quotation marks omitted.) *Holt-Lock, Inc.* v. *Zoning & Planning Commission*, 161 Conn. 182, 191, 286 A.2d 299 (1971). "The court's review is based on the record, which includes the knowledge of the board members gained through personal observation of the site . . . or through their personal knowledge of the area involved." (Citation omitted.) *Connecticut Health Facilities, Inc.* v. *Zoning Board of Appeals*, 29 Conn. App. 1, 10, 613 A.2d 1358 (1992).

In *Frito Lay Inc.* v. *Planning & Zoning Commission*, 206 Conn. 554, 538 A.2d 1039 (1988), the Supreme Court, commenting on personal information that the commission had relied on, stated: "The trial court observed correctly that commission members may legitimately utilize their personal knowledge in reaching a decision. . . . That, however, is not an acceptable explanation for the trial court's determination that much, if not all, that was said about Frito-Lay's existing operations was common knowledge within Killingly . . . . Even assuming that much of this was common knowledge, these comments were made at hearings not authorized by law." (Citation omitted; internal quotation marks omitted.) Id., 570.

In this case, the defendant Planning Commission did not put its experiences with the White Street, Danbury Connecticut transfer station on the record during the course of the hearings on this application. Accordingly, such personal knowledge may not be utilized by the defendant Planning Commission in rendering their decision.

This court has reviewed the record with respect to this odor issue and finds as follows.

The plaintiff's odor expert, Todd Wollenhaupt, testified on both January 2, 2008, and on January 30, 2008. In addition, this expert submitted a revised report during the January 30, 2008 hearing. (ROR 30, Ex. T.) During the January 2, 2008 hearing, when asked about the odor control system's effectiveness at keeping odors from escaping the facility, the following exchange occurred between the plaintiff's odor expert and commission member J. Urice:

"Q: If you will, packing these drums whether this bay works during ordinary use, you would say that there is no odor escaping during this period of time?
"A: What I'm saying is that the system is designed to keep a negative pressure for a period of time, up to about four minutes with one door open that is correct.
"Q: How about with two doors open.
"A: That may create a different condition.
"Q: How about with three doors open.
"A: It might get worse. . . .
"Q: If there is to be no odor emanating from this project outside the building, how do we account for whatever odors being hauled in to the end of the driveway at the building end and rots until it's hauled out in the empty vehicle leaving?
"A: That's a good question, I can't speak to that. I can only speak to the system that I designed for the interior of the building, to keep odors from emanating from outside the building." (ROR 50, pp. 4-5.)

Moreover, the report submitted by plaintiff's odor expert during the January 30, 2008 hearing stated the following regarding odors outside the facility: "The third stage for treating odors on-site will include the use of odor modifying agents (masking agents, neutralizers and anti-bacterial compounds) to alter the odor being emitted from a source outside the air quality control system. . . . The use of these agents is commonplace in the industry and may be considered a best management practice (BMP) and standard operating procedure (SOP) when managing odor at a facility." (ROR 30, Exh. S.)

While the plaintiff's odor expert did testify at the January 30, 2008 hearing that mulch could be considered a masking agent, the following exchange also took place during that

hearing, again between the plaintiff's expert and Urice:

"Q: Just to summarize, the contention is in the application is I am living on Eden Drive and I was up there yesterday, I won't see anything, I won't smell anything. . . .

"A: I can attest to what would be inside that building, I am confident what's inside that building the system will treat it. What drives by on Newtown Road or another road that may waft up there I have no control over.

Q: I've asked you coming from that facility, is it your contention that nothing coming away from that facility?

"A: I don't think I can speculate on that. . .

"Q: I will eliminate the noise question, but if you are living on Eden Drive, you won't smell anything and there is no risk of contamination, bacterial, viral, chemical coming from this facility - I'm not talking about inside.

"A: I can't speak to anything but what I, I am giving you the best solution that I can give you inside the building.

"Q: You can't answer the question?

"A: I am sorry I don't have the capability to see into the future. . . .

"Q: What you're testifying to has to do with . . . within the building, but you are not making any representation for any operation outside?

"A: No.

"Q: That's not a fair question.

"A: That's the answer to the question. I am not making any representation outside the building." (ROR 51, p. 34-36; See also ROR 51, p. 42.)

The testimony from the plaintiff's odor expert in the record illustrates a lack of information, or uncertainty, as to odors that would be present outside of the facility at any point in time, such as odors emanating from storage containers or transfer trailers. The Supreme Court has held that "[w]e have said that an administrative agency is not required to believe any witness, even an expert, nor is it required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair." *Huck* v. *Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 542, 525 A.2d 940 (1987). "If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission." (Internal

quotation marks omitted.) *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 33, 19 A.3d 622 (2011).

There is conflicting evidence in the record regarding the effectiveness of the proposed odor management controls for odor outside of the buildings on the project site; that is, for those areas not controlled by the proposed odor control management system. The defendant Planning Commission chose to give greater weight to the testimony of the plaintiff's odor expert, albeit more so for the fact that he could not give the defendant any assurances regarding this issue, than it did to the report submitted by the expert. The defendant Planning Commission also took into consideration the impact of the odors on the City of Danbury Housing Authority project immediately adjacent to the proposed site as well as to other residential areas in close proximity to the proposed site.

The court finds that the defendant Planning Commission's denial of plaintiff's special permit application pursuant to § 10.C.4.a.1 of the Danbury Zoning regulations on the grounds that the proposed transfer station site would result in odors that would create a nuisance having a detrimental effect on adjacent properties is supported by substantial evidence in the record. In addition, the court finds that such denial was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant Planning Commission's denial of the plaintiff's special permit application on such grounds is upheld.

C. Commission's Denial of Special Permit Based on Character of the Neighborhood

The plaintiff next argues that the defendant Planning Commission's denial of its special permit application on the grounds that its proposed waste transfer station site was not compatible with the character of the neighborhood is not supported by substantial evidence in the record and

must be overturned.

In its determination of whether to approve or deny the plaintiff's special permit application, the defendant reviewed such application in light of § 10.C.4.a (2) of the Danbury Zoning Regulations, which states, in relevant part, "[i]n addition to the requirements specified above, no special exception or special permit shall be approved unless the Planning Commission or Zoning Commission, respectively, shall have found that the proposed use . . . (2) is designed in a manner which is compatible with the character of the neighborhood."

In its denial, the defendant Planning Commission held: "[b]ased on the record of the Application and its own experiences in approving site development plans, the Planning Commission finds that the proposed use is not designed in a manner which is compatible with the character of the neighborhood. The Planning Commission acknowledges that this lot is located in the IG-80 Zoning District and is adjacent to other industrial uses. It is, however, also adjacent to a well-established public housing development. . . . The applicant proposes to construct an 11,000 square foot building to operate a transfer station and volume reduction facility, a 128 square foot scale house and three outdoor storage areas for tires, brush/stumps and trailers/containers on the 3.3 acre site . . . . The applicant proposes that the facility will receive and process approximately 500 tons of municipal solid waste and construction and demolition debris daily. The Planning Commission finds that the configuration of the lot and existing topography in conjunction with the operational requirements of the use have forced the building design and lot layout as proposed. The four sets of delivery doors face west, directly in view of the adjacent residential use. The topography has been altered to create a development pad that accommodates the change in grade required by operations inside the building. Thus, the higher

elevation is on the west side of the building facing the adjacent residential properties, while the lower elevation is on the east, adjacent to other industrial uses. The west side of the building is where deliveries are to be made. All vehicular traffic will circulate in a one-way flow around the west side of the building climbing a driveway grade to a maximum of 12 percent in certain locations. Transfer trailers accepting such waste will be located and loaded on the inside of the east side of the building and will either descend the site driveway to exit the site or be hauled to the northwest corner of the site for outdoor storage. The orientation of the building and one way access, while meeting the applicant's objectives from an operational standpoint, is not in the opinion of the Planning Commission in consideration of the adjacent residential use, compatible with the character of the neighborhood, specifically the adjacent multi-family residential use." (ROR 41, p. 11.)

The plaintiff contends that the existing zoning and character of the neighborhood is decidedly industrial. The plaintiff argues that its proposed project site is flanked by Dell's Auto Wrecking to the south, the City of Danbury wastewater treatment plant to the north, the former City of Danbury dump to the east and a commercial mulching operation to the north of the City of Danbury's wastewater plant. (Pl. 6/7/10 Br. p.13.) The plaintiff also contends that out of respect for the residential zone abutting the property to the west, it has taken good advantage of the unique topography of the site and preserved and enhanced existing vegetation and that its proposed waste transfer facility will be invisible to the west except for the very top of the building. (Pl. 6/7/10 Br. p.13.) It also argues that each of the representatives of residential developments objecting to the plaintiff's application purchased its site or unit with "eyes fully open and aware of the potential industrial uses next door." (Pl. 6/7/10 Br. p.13.); See also ROR

51, pp. 60-61. The plaintiff argues that "this is not a case of a City constructing industrial uses near public housing, but of public housing locating next to industry in order to achieve a particular aim, i.e. larger units." (Pl. 6/7/10 Br. p. 14.) The plaintiff also states that "each of the condominiums whose unit owners testified against the transfer station purchased in a community where the public offering statement delivered to all owners by the developer made specific reference to the presence of the industrial zone and warned residents that industrial uses could produce noise, odor and other undesirable environments." (Pl. 6/7/10 Br. p. 14.)

In response, the defendant Planning Commission argues that since the plaintiff seeks a special exception, although the zone the property is located in may be zoned industrial, the use proposed by the plaintiff can be had if, and only if, the Planning Commission finds that the proposed use is in keeping with the character of the neighborhood. (Def. 8/16/10 Br. p. 20.) The defendant Planning Commission further argues that the changing character of the neighborhood can be considered by it.

In *Irwin* v. *Planning & Zoning Commission*, 45 Conn. App. 89, 694 A.2d 809 (1997), rev'd., 244 Conn. 619, 711 A.2d 675 (1998), the plaintiff argued that the zoning regulations regarding special permits requiring projects to be in keeping with the town plan of development, as well as the current and future character of the neighborhood, were too general. The Appellate Court agreed, stating, "[t]he zoning commission's first reason for denying the plaintiff's application is that the plaintiff did not show that the subdivision and interior lots will be in keeping with the Town Plan of Development. . . .This standard, as set forth in the town's zoning regulations, is extremely vague and nearly impossible to satisfy. . . . The 'probable future character' of the neighborhood is not a sufficiently precise term that a reasonable person could

follow. If the town desires a neighborhood to have a particular character in the future, it should zone the area accordingly." (Citations omitted; internal quotation marks omitted.) Id., 97-99.

The Supreme Court overturned this decision, however, stating: "We previously have recognized that the special permit process is, in fact, discretionary. In *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, 229 Conn. 176, 177, 640 A.2d 100 (1994), we concluded that general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit. Also, we have stated that before the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns, such as parking or traffic congestion, would adversely impact the surrounding neighborhood. . . . The Appellate Court has acknowledged that Connecticut courts have *never* held that a zoning commission lacks the ability to exercise discretion to determine whether the general standards in the regulations have been met in the special permit process. . . . If the special permit process were purely ministerial there would be no need to mandate a public hearing." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 626-27, 711 A.2d 675 (1998).

In *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 381, the Supreme Court addressed the denial of a proposed special permit for a temple, based on the planning and zoning commission's determination that the temple was not in harmony with the general character of the neighborhood. Id. In that case, the trial court had determined that the commission had relied on substantial evidence in the record to determine that the proposed temple would not be in harmony with the surrounding neighborhood and pointed to

findings in the record that the temple would generate multiple monthly festivals where approximately 450 persons and 148 cars would be present, resulting in a significant source of noise and disruption to the surrounding residential neighborhood. Id., 387. The Supreme Court in upholding the trial court stated, "[w]e conclude that this evidence supported the conclusion that the activities at the proposed temple would cause a significantly greater disruption to the neighborhood than any permitted use of the property would, and, therefore, the proposed use clearly was not in harmony with the general character of the neighborhood. We conclude, therefore, that the commission's decision that the proposed use violated § 8.04.710 of the regulations was supported by substantial evidence." Id., 440.

In the present matter, the proposed waste transfer site is located in the IG-80 Zoning District. The neighborhood at issue has industrial as well as residential uses, and it is not insignificant that all of the proposed operations both face and are visible to the City of Danbury public housing residential community. Further, in its denial, the defendant specifically notes: "The higher elevation is on the west side of the building, facing the adjacent residential properties, while the lower elevation is on the east, adjacent to other industrial uses." (ROR 41 p. 11). The defendant's denial based on the direction in which the proposed project would face is supported by substantial evidence in the record. On December 17, 2007, the plaintiff's landscape architect and the commission members discussed the elevation of the proposed project in relation to the viewpoint of the abutting residential areas. (ROR 49, pp. 23-26.) Attorney Dom Chieffalo, the chairman of the housing authority of the City of Danbury, testified during the public hearings on January 30, 2008, that: "If you look at the doors, the access doors where the trucks come in, they face Eden Drive housing Complex." (ROR 51, p. 58.)

In addition, the Community Action Committee of Danbury (CACD), an anti-poverty agency, submitted a letter in opposition to the plaintiff's special permit application. (ROR 30, Ex. X). In that letter, the CACD asked the defendant Planning Commission to reject the application for the plaintiff's proposed waste transfer station to be located near the adjacent low-income housing complex on the grounds that there are well-documented health risks to residents living near waste facilities, including asthma and other respiratory and breathing diseases and that children near the transfer station would stay inside more due to the odor that would come from the transfer station and not play at the playground or basketball court. Id.

The court finds that the defendant Planning Commission's denial of the plaintiff's special permit application pursuant to § 10.C.4.a (2) of the Danbury Zoning regulations on the grounds that the proposed activities at the waste transfer site would cause a significantly greater disruption to the neighborhood than any permitted use of the property would, and, therefore, the proposed use was not in harmony with the general character of the neighborhood was supported by substantial evidence in the record and was not an arbitrary, illegal or an abuse of discretion. Accordingly, the defendant Planning Commission's denial of the plaintiff's special permit application on such grounds is upheld.

D. Commission's Denial of Special Permit Based on Traffic Safety

The plaintiff next argues that the defendant Planning Commission's denial of its special permit application on the grounds that the proposed special permit would result in conditions adversely affecting traffic safety is not supported by substantial evidence in the record and must be overturned.

In its denial of the plaintiff's application, the defendant Planning Commission bases its

decision on Danbury Zoning regulation § 10.C.4.a (3) which states, in relevant part, that "[i]n addition to the requirements specified above, no special exception or special permit shall be approved unless the Planning Commission or Zoning Commission, respectively, shall have found that the proposed use . . . (3) will not create conditions adversely affecting traffic safety or which will cause undue traffic congestion . . . ."

In its denial, the defendant Planning Commission cited that the "[c]ity Traffic Engineer/Traffic Authority and the applicant's traffic expert agree as to the existing and proposed volumes and vehicle types to be generated by the proposed use. Waste transfer stations predominantly dependent on the use of heavy vehicles for its operations. The parties agree that 92% of the trips generated by the facility would be composed of heavy truck traffic (collection trucks and transfer trailers). Collection trucks can measure up to 40 feet in length while transfer trailers can measure up to 70 feet in length." (ROR 41 p. 13.) The defendant Planning Commission further stated in its denial that "[t]raffic safety is a function of existing traffic volumes, projected volumes based on land use proposed, roadway geometry and distribution, evaluation of accident rates and driver habits. Different land uses generate different volumes and different vehicle types. To assess the traffic safety impacts of a proposed special exception use, the Planning Commission requires applicant to submit a Traffic Impact Analysis. . . . The analysis considers both on site traffic safety conditions as well as traffic safety on the public roadways. The Commission acknowledges that the applicant submitted the required Analysis. . . . The applicant's traffic expert concluded that, in his opinion, the proposed development will result in 'modest traffic' which will 'not create an unreasonable impact on the relevant roadway system.' The Planning Commission, based on evidence in the record, upon reports from the City

Traffic Engineer/Traffic Authority it finds credible, and upon its own experience and observations, respectfully disagrees. It is therefore, unable to make the finding that the proposed use will not create conditions adversely affecting traffic safety." (ROR 41, p. 12).

The defendant Planning Commission identified the following areas of concern with respect to traffic safety relating to the plaintiff's special permit application. First, that the plaintiff identified an area on the site plan for a southbound turn lane, but did not design the turn lane or present the design for review as was required by the regulations. (ROR 41, pp. 12-13.) Second, the plaintiff did not provide a northbound ingress left-turning lane on Plumtrees Road as was recommended by the City Traffic Engineer, and the failure to include this turning lane does not ensure public safety and safe flow of traffic. (ROR 41, p. 12). Third, the sight distance for the proposed left turn egress lane did not fully meet Connecticut Department of Transportation (CDOT) criteria and the plaintiff's suggestion to install a speed monitor sign to address this sight distance issue was not a sufficient solution. (ROR 41, p. 12.) Fourth, the plaintiff's response to the defendant's concern over the number of accidents on Newtown Road, to redistribute volumes or divert vehicle trips along segments of the roadway, is not consistent with standard engineering practices and fails to ensure safety to the public. (ROR 41, p.13.) Fifth, the initial analysis identified a deteriorating level of service for one movement at the Newtown Road and Plumtrees Road intersection. Such delay means vehicles will wait longer, which will result in driver frustration and attempts to make unsafe moves, which represents deteriorating traffic conditions. (ROR 41, p. 13.) Finally, that the plaintiff revised the traffic distribution after the submission of its initial analysis, but in its revised analysis, no traffic is assigned to the southern section of Plumtrees Road, rendering the analysis flawed and incomplete. (ROR 41, p. 13.)

The plaintiff argues with respect to the northbound ingress left turning lane, that it deleted that lane to discourage vehicles from accessing the site from the south, and that the defendant could have required restoration of the lane as a condition of approval. The plaintiff also argues that there was not enough room to build this lane, and the requests of the City Traffic Engineer/Traffic Authority were contradictory and impossible because the plaintiff could not discourage traffic from approaching from the south and provide a left hand turn lane that could not be built for lack of room. The plaintiff further argues with respect to the sight distance issue, that both its expert and the City Traffic Engineer found that the sight distance was sufficient. With respect to the defendant's concern over the number of accidents on Newtown Road, the plaintiff argued that it cannot control traffic on a road that it does not own. The plaintiff contends that there is nothing in the record that this off-site traffic impact is any worse than that which would have been produced by an as-of-right use. The plaintiff further contends, with respect to an analysis of traffic that was not provided for the southern section of Plumtrees Road, that its expert did provide an analysis of this traffic. In its administrative appeal brief the plaintiff did not address the issue of an accident analysis with respect to the issue of traffic safety.

In response, the defendant Planning Commission argues that with respect to the north bound ingress left turning lane, it asked for an evaluation, not a deletion of this lane. The defendant contends that elimination of this lane would only serve to add to the congestion of Plumtrees Road as heavily loaded trucks would block the northbound lane of Plumtrees Road while waiting for a sufficient break in traffic to turn. (Def. 8/16/10 Br. p. 26.) The defendant Planning Commission stated in its denial, that "[t]he applicant did not provide a northbound ingress left-turning lane on Plumtrees Road into the site as was recommended by the City Traffic

Engineer/Traffic Authority to improve traffic safety and ingress into the site. Failure to include this turning lane does not ensure public safety and safe flow of traffic and conditions on Plumtrees Road." (ROR 41, p. 12.)

The court's review of the record reveals that the City Traffic Engineer/Traffic Authority requested in its letter dated January 10, 2008, that "US EPA recommends that both deceleration lanes and turning lanes be provided at Waste Transfer Facilities so as to separate heavy trucks from the stream of general traffic and, therefore, enhance traffic operations. For this reason, it is requested that within 150 feet on both sides of the site driveway, Plumtrees Road is to be widened to provide a northbound exclusive left-turn lane . . . ." (ROR 20, p. 5.) While the plaintiff states that this lane was deleted in order to address concerns by the defendant Planning Commission, the paragraph that the plaintiff points to merely asks for an evaluation of the traffic, not for a deletion of the lane. (ROR 20, p. 4.) Further, the defendant Planning Commission points to the final analysis submitted by the City Traffic Engineer/Traffic Authority in support of this section of the denial, which states "[d]ue to the fact that waste to be processed by the facility would originate from various sources within the City of Danbury and its surrounding towns, we expect that a portion of site generated traffic will utilize the southerly section of Plumtrees Road between the site driveway and Shelter Rock Road and Plumtrees Road intersection for access. Therefore, our earlier request on the need for provision of a northbound exclusive left-turning lane from Plumtrees Road into the site stands." (ROR 39, p. 4.)

The March 4, 2008 report of the City Traffic Engineer/Traffic Safety on which the defendant relies, in part, to deny the plaintiff's application is an analysis of evidence already in the record. That is, the City Traffic Engineer's previous request for a northbound lane, and the

plaintiff's failure to include one. This request, and the plaintiff's failure to submit the lane, all occurred before the close of the public hearings. With respect to the issue of whether the Planning Commission may rely upon a City Traffic Engineer/Traffic Authority March 4, 2008 report submitted after the close of the public hearings, our Appellate Court has addressed this issue. In *Norooz* v. *Inland Wetlands Agency*, 26 Conn. App. 564, 602 A.2d 613, 617 (1992), the Appellate Court addressed the issue of whether a municipal administrative agency may receive ex parte, or extrarecord assistance from its technical experts, including after the close of a hearing. The Appellate Court held "[t]he proper inquiry for a reviewing court, when confronted with an administrative agency's reliance on nonrecord information provided by its technical or professional experts, is a determination of whether the challenged material includes or is based on any fact or evidence that was not previously presented at the public hearing in the matter." Id., 573-74. In *Norooz* , the Appellate Court held that the nonrecord information received by the commission in that case was reviews, comments and opinions concerning evidence in the record and that the commission's reliance on that information was proper. In this case, the court also finds that the defendant Planning Commission can rely on the March 4, 2008 report submitted by its City Traffic Engineer/Traffic Authority after the close of public hearings, as that report contains opinions on evidence that was already in the record.

The plaintiff next contends that the defendant Planning Commission's grounds for denial, that the sight distance for the proposed left turn egress lane did not fully meet CDOT criteria and the plaintiff's suggestion to install a speed monitor sign, did not address this sight distance issue, is not supported by substantial evidence in the record.

The court's review of the record shows that both the City Traffic Engineer/Traffic

Authority and the plaintiff's expert concluded that the proposed sight line of 575 feet was sufficient. Specifically, the City Traffic Engineer/Traffic Authority stated in his report dated March 4, 2008, that "[i]t is stated in Table 3 of the Traffic Impact and Access Analysis Report that the driveway sight distance for left-turn egress vehicles does not fully meet ConnDOT criteria. It is our opinion that the achieved sight distance is within a reasonable range, and, therefore, is generally acceptable." (ROR, Item 39, p. 4.) Nevertheless, the defendant in its denial disagreed with both experts and instead relied upon information located in the record at ROR 24, Table 3. Table 3 provides that when a single-unit truck travels at the eighty-fifth percentile speed of forty-one miles per hour, the sightline distance needs to be 588 feet. (ROR 24, Table 3). The defendant stated in its denial that "based on its personal experiences and observations," it disagreed with the experts that the sightline was adequate. (ROR 41, p. 12).

"If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission." (Internal quotation marks omitted.) *Rapoport* v. *Zoning Board of Appeals*, supra, 301 Conn. 33. It is clear that the contents of Table 3 conflicts with both expert's analysis of the table and accordingly this court cannot substitute its judgement as to the weight given this evidence by the defendant. Upon review of the record, however, the court does not find that there is substantial evidence to support defendant's findings in this regard.

With respect to the number of accidents that occur on Newtown Road, the defendant Planning Commission set forth in its denial that "the State of Connecticut Department of Transportation has identified at least six locations along Newtown Road as major accident sites in the State. And, as noted by the City Traffic Engineer/Traffic Authority, the majority of

accidents in this location are rear-end collisions or result from turning movements. The applicant's response to concerns over the number of accidents in this location was to redistribute volumes or divert vehicle trips along certain segments of the roadway recognized for its high number of accidents. It also understated the safety performance of the intersection of Newtown Road and Plumtrees Road by not evaluating State accident data and it presented no mitigation measures. The applicant specifically left the evaluation of required roadway improvements to others. The Planning Commission finds based on the opinion of the City Traffic Engineer/Traffic Authority that diverting trips to avoid an evaluation of impacts and understating safety performance at a critical intersection is not consistent with standard engineering practice and fails to ensure safety to the monitoring public." (ROR 41, p. 12.)

In his January 10, 2008 report reviewing plaintiff's traffic analysis report, the City Traffic Engineer/Traffic Authority stated: "[i]n accordance with the project Traffic Impact and Access Analysis, fifty (50) percent of the site traffic will travel to and from Newtown Road, easterly of Plumtrees Road intersection. However, based on the most current ConnDOT data, the roadway experiences a relatively high number of accidents. During the period January 1, 2004 through December 31, 2006, a total of 276 vehicle crashes were recorded. This translates to an average of 445 accidents per mile or 92 accidents per year. Most of the accidents are turning and rear-end types of accidents. We are concerned that the heavy trucks traffic to be generated by the facility would exacerbate the current roadway safety condition." (ROR 20, p. 3.) With respect to the impact of site traffic on Newtown Road, westerly of Plumtrees Road, the City Traffic Engineer/Traffic Authority stated in his report that: "the State of Connecticut Department of Transportation has identified at least six locations along the roadway to be among the major

traffic accident sites in the State. We, therefore, seek information from the applicant as to what mitigating measures would be implemented to rectify or ensure that the site generated heavy trucks traffic would not make the current condition much worse." (ROR 20, p. 3.) In his report submitted on March 4, 2008, the City Traffic Engineer/Traffic Authority reflected on the revised submissions of the plaintiff, and stated "(1) [a]lthough the existence of unsafe roadway conditions has been acknowledged, no mitigation measures have been proposed for implementation by the applicant as p[a]rt of this project; (2) the applicant recommends that all measures to address the condition are to be implemented by others. However, with the unavailability of funds by both the State and the City, such measures cannot be immediately implemented; and (3) due to business dynamics, it is very difficult to predict future operating conditions of competing businesses. As a result, the argument made by the applicant that the proposed facility would divert traffic from an existing business located on White Street is not acceptable. The argument is not part of standard traffic engineering practice." (ROR 39, p. 2.) The City Traffic Engineer/Traffic Authority then went on to state that "[t]he traffic accident data presented in Figure 9 of the revised Traffic Impact and Access Analysis Report is not acceptable. The data is significantly lower than the data compiled by the State ConnDOT for the intersection during the same time period. It, therefore, appears that the safety performance of the intersection of Newtown Road and Plumtrees Road has been significantly understated in the Report." (ROR 39, p. 2.)

In its denial, the defendant Planning Commission set forth that "[t]he record reflects that the applicant revised its traffic distribution after submission of the initial Analysis. . . .The Planning Commission agrees with the City Traffic Engineer/Authority that the revised analysis is

flawed. While such design modifications [the elimination of the northbound left turn lane, and the effort to direct vehicles exiting the Property north] may be well meaning . . . such modifications do effectively stop all such movements. Therefore, there is likely to be generated traffic exiting the site onto Plumtrees Road heading in a southerly direction . . . . Absent assignment of traffic to this section of roadway and an evaluation of potential traffic, especially considering applicant's acknowledgment that waste will likely come from the adjacent municipality of Bethel, Connecticut located south on Plumtrees Road, renders the Analysis incomplete. . . . The Planning Commission again finds this representative of deteriorating traffic safety conditions." (ROR 41, p. 13.)

The court further finds that the defendant Planning Commission's denial of plaintiff's special permit application on the site line grounds was not based on substantial evidence and its decision on this ground was an abuse of discretion. While the court has found that the defendant Planning Commission's denial of the plaintiff's special permit application on traffic safety grounds was not supported by substantial evidence with respect to the site line issue, the court does find that the defendant Planning Commission's denial of plaintiff's special permit application pursuant to § 10.C.4.a (3) of the Danbury Zoning regulations on the remaining grounds set forth in its denial on traffic safety issues are supported by substantial evidence in the record. The court also finds that the defendant's finding that the proposed special exception use would result in conditions adversely affecting traffic safety is supported by substantial evidence in the record and that such denial was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant Planning Commission's denial of plaintiff's special permit application on traffic safety grounds is upheld.

E. Commission's Denial of Special Permit Based on Traffic Congestion

The plaintiff next argues that the defendant Planning Commission's denial of its special permit application on the grounds that the proposed special exception use will result in conditions adversely affecting traffic congestion is not supported by substantial evidence in the record and must be overturned.

With regard to the issue of traffic congestion, the defendant Planning Commission states in its denial that "[t]raffic congestion is a function of traffic volumes and roadway conditions. However, there is disagreement between the experts relative to congestion and mitigation specifically for westbound vehicles on Newtown Road that are waiting to turn left onto Plumtrees Road to access the site. The parties agree that increased heavy truck traffic will be generated by the proposed use. . . . The City Traffic Engineer/Traffic Authority indicates that the queue length for this turn will increase by thirty-three feet as a result of site generated traffic. The Planning Commission understands this to mean that the length of turning lane is insufficient to accommodate the volume of traffic expected to turn left at the intersection. As a result, vehicles may back up into the through lanes while awaiting a green turn cycle, and, consequently through bound traffic will be impeded.. . . . The applicant has indicated that traffic signal timing was included in the revised Analysis as a mitigation measure. No physical roadway improvement was proposed to mitigate the queue length deficiency. . . . The Planning Commission finds the City Traffic Engineer/Traffic Authority's comment that signal timing adjustment was not, in fact, in the Analysis to be credible and therefore the effectiveness of mitigation could not be confirmed. Due to the configuration of the lot, the layout of the site, the types of vehicles that will utilize the facility and existing roadway conditions, the Planning

Commission finds that there are no conditions that can be imposed that will improve traffic safety and alleviate undue traffic congestion resulting from the proposed use." (ROR 41, p. 14.)

In its administrative appeal brief, the plaintiff does not dispute that it left mitigation measures, such as roadway improvements, to others. (Pl. 6/7/10 Br. p. 19.) The plaintiff contends that it took this position as the roadway would have to be expanded and land taken from abutters, measures that the plaintiff was powerless to effect. (Pl. 6/7/10 Br. p. 19.) The plaintiff, however, contends that , there is no basis in the record for the defendant Planning Commission's finding that the traffic impacts resulting from the plaintiff's proposed use were greater than expected impacts from as-of-right uses and that the defendant Planning Commission made this up "out of whole cloth." (Pl. 6/7/10 Br. p. 19.) Notwithstanding the foregoing, the plaintiff contends that the defendant is not allowed to consider any materials submitted by the City Traffic Engineer/Traffic Authority including its March 2008 report, following the close of the public hearings as a basis for its denial.

Our Supreme Court has been clear that, with respect to the issue of traffic congestion, "in order to deny a special permit because of traffic, the project must cause traffic congestion and have a greater impact on the area than other permitted uses for the property not requiring a special permit." *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 433.

The Supreme Court held in *Cambodian Buddhist Society of Connecticut, Inc.* in reviewing the denial by the planning commission of the plaintiff's application for a special permit to build a temple on its property, that "[w]hen a use is not allowed as of right, but only by special exception, the zoning commission is required to judge whether any concerns, such as

parking or traffic congestion, would adversely impact the surrounding neighborhood. The reason for this requirement is that, although such uses are not as intrusive as commercial uses . . . they do generate parking and traffic problems that, if not properly planned for, might undermine the residential character of the neighborhood. Thus, there is no presumption that a specially permitted use, or the traffic that it will generate, necessarily is compatible with any particular neighborhood within the zoning district. . . . Accordingly, we conclude that, if a special permitted use would have a *significantly* greater impact on traffic congestion in the area than a use permitted as of right, the additional congestion may provide a basis for denying the permit. . . . Moreover, the significance of the impact should not be measured merely by the number of additional vehicles, but by the effect that the increase in vehicles will have on the existing use of the roads. An increase of 100 vehicles per hour may have a negligible impact at one time or location and a ruinous impact at another time or location. In making this determination, the commission may rely on statements of neighborhood residents about the nature of the existing roads in the area and the existing volume of traffic, and its own knowledge of these conditions." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 432-434. The Supreme Court in *Cambodian Buddhist Society of Connecticut, Inc.* further held that while the commission had made a determination that there would be an increase in traffic volume, they had not made a determination that the proposed project would increase traffic congestion or hazards on the road significantly more than a permitted use of the property, and accordingly, that the evidence was inadequate to support the commission's conclusion that the proposed use of the property did not satisfy the regulations. The Supreme Court, however, went on to uphold the decision of the commission based on other concerns the commission had regarding the proposed

septic systems, which it found would create a health and safety hazard.

With respect to the issue of whether the Planning Commission may rely upon the March 4, 2008 City Traffic Engineer/Traffic Authority report submitted after the close of the public hearings, as set forth above our Appellate Court has addressed this issue. In *Norooz* v. *Inland Wetlands Agency*, supra, 26 Conn. App. 573-74, the Appellate Court addressed the issue of whether a municipal administrative agency may receive ex parte, or extrarecord assistance from its technical experts, including after the close of a hearing. The Appellate Court held "[t]he proper inquiry for a reviewing court, when confronted with an administrative agency's reliance on nonrecord information provided by its technical or professional experts, is a determination of whether the challenged material includes or is based on any fact or evidence that was not previously presented at the public hearing in the matter." Id., 573-74. In this case, the court also finds that the defendant Planning Commission can rely on the March 4, 2008 report submitted by its City Traffic Engineer/Traffic Authority after the close of public hearings, as that report contains opinions on evidence that were already in the record.

In its denial of the plaintiff's special permit application, the defendant Planning Commission specifically states that the expected impacts of congestion are greater than other uses not requiring a special permit. (ROR 41, p. 14.) The defendant Planning Commission found that the large heavy vehicles proposed to be used for the project would have an effect on congestion, as large heavy vehicles move slower and this would extend queue times. In addition, the defendant found that the traffic would have a negative material impact on average delay for all traffic. In support of its position, the defendant Planning Commission points to the plaintiff's expert analysis of average delay for all traffic at ROR 24 Table 2. Instead of the .7 second delay

per vehicle in the peak morning hour for all traffic and 1.4 second delay in the afternoon cited by the plaintiff's expert, the defendant Planning Commission interpreted the table to mean a 14.6 minute delay at rush hour. The defendant contends that when "these increases in per vehicle delay are applied to the traffic volume for the intersection maneuver in question . . . a far more significant delay, fourteen minutes versus 1.4 seconds is manifest." (Def. 8/16/10 Br., p. 29). The defendant Planning Commission's analysis conflicts with the plaintiff's expert's analysis of the table and interprets the evidence in a different light. This court cannot substitute its judgement as to the weight given to this evidence by the defendant. See *Rapoport* v. *Zoning Board of Appeals*, supra, 301 Conn. 33. The court notes, however, that in the defendant's denial regarding the issue of congestion, the defendant Planning Commission does not point to any evidence in the record that establishes that the proposed use, which would involve the use of several trips by heavy trucks, would result in significantly greater traffic than any of the other permitted uses for the IG-80 zone.

Unlike the situation in *Cambodian Buddhist Society of Connecticut, Inc.*, the proposed special permit project is located in an industrial zone, and permitted uses in this zone, pursuant to the regulations, include schools and truck terminals, all of which could feasibly also involve the use of multiple trips by large, heavy buses or vehicles. A review of the record also does not reveal substantial evidence that illustrates that the proposed use would result in significantly greater traffic congestion than any of the permitted uses.

The court finds that the defendant Planning Commission's denial of the plaintiff's special permit application on the grounds that the traffic congestion impacts are greater than other uses not requiring a grant of special exception is not supported by substantial evidence in the record

and that its finding that the proposed special exception use would result in conditions adversely affecting traffic congestion are arbitrary. Accordingly, the defendant Planning Commission's denial of the plaintiff's special permit application on such grounds is overturned.

F. Commission's Denial Based on Public Safety

The plaintiff next argues that the defendant Planning Commission's denial of its special permit application on the grounds that the proposed special exception use will result in conditions adversely affecting public safety is not supported by substantial evidence in the record and must be overturned.

The Supreme Court has addressed whether public safety is a proper consideration in the review of a special exception application in *Municipal Funding, LLC* v. *Zoning Board of Appeals*, 270 Conn. 447, 853 A.2d 511 (2004). In that case, the Supreme Court held that "[t]he special exception process is discretionary and the zoning board may base its denial of such application on general considerations such as public health, safety and welfare, which are enumerated in zoning regulations." (Internal quotation marks omitted.) Id., 455.

In its denial of the plaintiff's special permit application, the defendant Planning Commission based its denial on § 10.C.4.a (4) of the Danbury Zoning Regulations which states, in relevant part, "[i]n addition to the requirements specified above, no special exception or special permit shall be approved unless the Planning Commission or Zoning Commission, respectively, shall have found that the proposed use . . . (4) will not create conditions harmful to the natural environment or which will jeopardize public health and safety." In its denial, the defendant Planning Commission held that "the position of the Planning Commission related to traffic safety and congestion on the public roadway system is noted above. Based on these

findings, the Planning Commission fails to find that the proposed use will not result in conditions that jeopardize public safety."(ROR 41, p. 15.) The defendant Planning Commission then cited four additional grounds for its position that the plaintiff's special permit application jeopardized public safety: (1) the plaintiff's application failed to comply with the minimum required site distance as specified by State criteria; (2) the applicant's failure to provide a northbound right turn ingress lane on Plumtrees Road; (3) the interior roadway should be wider than twenty feet and less steep than the twelve percent grade and that the site layout and circulation pattern created conditions that jeopardized public safety; (4) the restrictive design of the interior roadway during inclement weather conditions may result in conditions that jeopardize public safety and that the layout could not be approved due to site size and topography.

The first specific grounds for denial, that the sight distance for the proposed left turn egress lane did not fully meet CDOT criteria, was addressed by this court above in traffic safety. The court found previously that there was not substantial evidence in the record to support the defendant Planning Commission's denial of plaintiff's application on this ground. With respect to the issue of public safety, the court also finds that there is not substantial evidence in the record to support the defendant Planning Commission's denial of the plaintiff's application on this ground and that the defendant's denial of the plaintiff's special permit application on this ground was an abuse of discretion.

The second specific grounds that the defendant Planning Commission raises in its denial with relation to public safety, is its contention that the plaintiff did not provide a *northbound ingress right-turning lane* on Plumtrees Road. (Emphasis added.) (ROR 41, p. 15.) The plaintiff notes in its administrative appeal this requirement for a "northbound ingress right-turning lane"

on Plumtrees Road and calls it a "curious requirement" as the plaintiff's property when proceeding northbound, is on the "left" side of Plumtrees Road and not the "right." The defendant Planning Commission did not address this issue in its response to plaintiff's administrative appeal brief as to whether it was a scrivener's error or whether that was an accurate basis for denial of plaintiff's special permit application. As the record clearly reflects that the northbound access to the plaintiff's property on Plumtrees Road is on the left side, and not the right side, the court concurs with plaintiff's argument that there is not substantial evidence in the record to support this basis for a denial of the plaintiff's special permit application on public safety grounds.

The third specific grounds that the defendant Planning Commission raises in its denial with relation to public safety, is its contention that the site layout and circulation pattern on the proposed site creates conditions that will jeopardize public health and safety. In particular, the defendant Planning Commission points to the interior roadway proposed by the plaintiff as not being wide enough at twenty feet and such roadway could reach a grade of twelve percent, which in the opinion of the defendant Planning Commission was too steep. (ROR 41, p. 15.)

The plaintiff contends in this administrative appeal that a twelve percent grade is permitted by § 8.B.1.b (3) of the Danbury Zoning Regulations and that the twenty foot roadway for a single lane of travel was well in excess of the twelve feet required by § 8.B.1.b (4) of the Danbury Zoning Regulations relating to roadway and driveway design. (ROR 1.) The defendant Planning Commission in its responsive brief does not even address this issue and the court has reviewed the record relating to this issue. As the defendant Planning Commission in its denial does not point to any reports or regulations that would support its position and the court could

not find any substantial evidence in the record to support this position, the court finds that the defendant's denial of the plaintiff's special permit application on this ground is not supported by substantial evidence in the record.

The final grounds that the defendant Planning Commission raises in its denial with relation to public safety, is its contention that during inclement weather conditions, the Planning Commission found that the restrictive site layout and circulation pattern may result in conditions that will jeopardize public health and safety. As set forth above, the defendant Planning Commission pointed to the interior roadway proposed by the plaintiff as not being wide enough at twenty feet and such roadway could reach a grade of twelve percent, which in the opinion of the defendant Planning Commission was too steep. (ROR 41, p. 15.) The defendant Planning Commission once again, in its responsive brief, does not even address this inclement weather issue as it relates to public safety and the court has reviewed the record relating to this issue. As the defendant Planning Commission in its denial does not point to any reports that would support its position on public safety issues relating to inclement weather, the court finds that the defendant's denial of plaintiff's special permit application on this ground is not supported by substantial evidence in the record.

As the court has not found any of the grounds cited by the defendant Planning Commission in support of its denial of the plaintiff's special exception permit application on public safety grounds to be supported by substantial evidence in the record, the defendant's denial of the plaintiff's special permit application on these grounds is overturned on the grounds such denial is deemed to be arbitrary

IV

COMMISSION'S DENIAL OF SITE PLAN APPLICATION

The applications at issue in this administrative appeal are applications for a special permit and for site plan approval pursuant to § 10.C.4 of the Danbury Zoning Regulations. Danbury Zoning Regulations § 10.C.4 (b)(1) requires that "approval of a petition for special exception, or approval with conditions attached, shall include approval of a site plan submitted at the time of the petition, modified as necessary to include all conditions lawfully required by the Planning Commission."

"When a zoning commission acts on a special permit *or site plan*, it acts in an administrative capacity . . . ." (Emphasis added.) *Cybulski* v. *Planning & Zoning Commission*, 43 Conn. App. 105, 110, 682 A.2d 1073, cert. denied, 239 Conn. 949, 686 A.2d 123 (1996). "When a commission is functioning in such an administrative capacity, a reviewing court's standard of review of the commission's action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 440, 908 A.2d 1049 (2006). "In appeals from administrative zoning decisions, the commission's conclusions will be invalidated only if they are not supported by substantial evidence in the record." (Internal quotation marks omitted.) *Heithaus* v. *Planning & Zoning Commission*, 258 Conn. 205, 215, 779 A.2d 750 (2001). "The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [board]. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [board] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its

judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission." (Internal quotation marks omitted.) *Loring* v. *Planning & Zoning Commission*, 287 Conn. 746, 756, 950 A.2d 494 (2008).

In its denial of the plaintiff's site plan application the defendant Planning Commission cited the following grounds as a basis for its denial: (1) the site plan failed to comply with § 6.C.2 (a) (1) of the Danbury Zoning Regulations; (2) the location of the grading and wall structures on the adjoining property of Putnam Automotive violated § 8.A.2 (c)(4) of the Danbury Zoning Regulations; (3) the site plan failed to comply with § 8.B.1.b (1) (a) and § 10.D.4.c of the Danbury Zoning Regulations; (4) the site plan application failed to comply with § 1.D.3 of the Danbury Zoning Regulations; (5) the site plan application was incomplete; and (6) the applicant did not satisfy the defendant Planning Commission that it could get grading rights. In addition to those grounds, the defendant Planning Commission cited the following grounds for denial of the site plan application on the grounds that such items failed to ensure public safety: (1) on site vehicle storage and maintenance; (2) storage of mulch and use of mulch on top of transfer trailers; (3) extended hours of operation; (4) extended storage of transfer trailers: (5) revisions to the site of Putnam Automotive at 14 Plumtrees Road.

A. <u>Commission's Denial of Site Plan Pursuant to § 6.C.2a (1) Danbury Zoning Regulations</u>

The plaintiff first argues that the defendant Planning Commission's denial of its site plan application on the grounds that the plaintiff failed to comply with § 6.C.2.a (1) of the Danbury Zoning Regulations is not based on substantial evidence in the record and must be overturned.

In its denial of the plaintiff's site plan application, the defendant Planning Commission

cited the plaintiff's failure to comply with § 6.C.2.a (1) of the Danbury Zoning Regulations, which requires "the front yards of lots in the IG-80 zone to be landscaped in their entirety except for permitted driveways." as a grounds for denial. (ROR 41, p. 15.) In support of its position, the defendant stated that "the project site is a flag lot. Flag lots are defined in Section 2.B of the Zoning Regulations as 'a lot so shaped and designed that the bulk of the lot is set back from the street behind other lots with street frontage. . . . The bulk of the project site is that portion of the lot upon which the proposed structure is to be located. It is west of, and behind, the lot located at 14 Plumtrees Road. . . .The front lot line for the project is the north/south property line separating the bulk of the lot from the adjacent lot at 14 Plumtrees Road. The front yard is defined in the Zoning Regulations as the '. . .open space extending the full length of the front lot line to a yard setback distance specified herein for front yards.' The IG-80 Zone requires a front yard of 40 feet. In accordance with the Zoning Regulations, the entire width of the 40 foot wide yard along the property line is required to be landscaped except for permitted driveways." (ROR 41, p. 16.) The defendant found that the plaintiff had submitted a revised plan that "resulted in the landscaping that had previously been located in the front yard as required pursuant to § 6.C.2.a (1) to be relocated onto the adjacent lot of Putnam Automotive (14 Plumtrees Road) . . . . There are no revisions to the site plan that can be made that would render the plan in compliance with the requirement of the front yard to be landscaped in its entirety while satisfactorily addressing the comments of the City Staff to ensure the safety of those utilizing the site and providing emergency services thereto" (ROR 41, p. 16.)

In the December 19, 2007 report of Jennifer L. Emminger, Associate Planner for the City of Danbury she states "[t]he landscape plan fails to provide the required landscaping in the front

yard. The Landscape Architect should incorporate a mixture of trees and shrubs along the property's frontage." (ROR 13, p.4.) While the plaintiff did revise the site plan to show landscaping, the March 4, 2008 report submitted by Jennifer Emminger cites that "the applicant added some trees and shrubs. However, the additional landscaping proposed on Sheet 4 does not meet the Zoning Regulations regarding front yard landscaping." (ROR 37, p.5.) Ms. Emminger's March 4, 2008 also notes: "[s]heet 4 has been revised to show additional landscaping to supplement the trees and shrubs in the front yard closest to Plumtrees Road. The comment is resolved. The revised plans show that the front yard landscaping located along the easterly property line bordering Putnam Automotive and required for compliance with § 6.C.2.a.(1) of the Zoning Regulations (the Zoning Regulations in effect at the time of the application) is now located on the property of Putnam Automotive. The location of the required landscaping as on the revised plans fails to comply with the Zoning Regulations." (ROR 37, p. 5.)

The plaintiff disagrees with the defendant Planning Commission's identification of the proposed project as a flag lot and argues that the section of the lot identified by the defendant as the front yard is actually the side lot. The plaintiff further contends that flag lots are not allowed in the IG-80 zone and that the definition of a flag lot pursuant to § 2.B of the Danbury Zoning Regulations does not apply to the subject property. Thus, the plaintiff contends that the subject property cannot be defined as flag lot nor held to the requirements of a flag lot. The court notes that the plaintiff provides no citation for the proposition that flag lots are not permitted in an IG-80 zone.

The parties clearly disagree as to whether the property at issue, 16 Plumtrees Road, is a flag lot. With respect to the issue of whether a flag lot can be in an IG-80 zone, § 3.H.3a (1) of

the Danbury Zoning Regulations provides, in relevant part: "Flag Lots. Flag lots are permitted within the RA-20, RA-40, and RA-80 zoning districts. . . ." The regulations do not state one way or the other whether flag lots are permitted within the IG-80 zone and plaintiff's argument in this regard is not persuasive. Moreover, § 2.B of the Danbury Zoning Regulations entitled "definitions" defines a flag lot as "a lot with access provided to the bulk of the lot by means of an access way. The panhandle serves as an access way to the lot located behind other lots with normally required lot frontage." The court notes that upon review of the record, in particular the site plans submitted by the plaintiff, such site plans visually depict a flag lot as defined by the Danbury Zoning Regulations. (ROR 55, 57, sheet 3.)

The key term in § 6.C.2.a (1) of the Danbury Zoning Regulations "front yard" is specifically defined in the zoning regulations that were in effect as of the time of plaintiff's special permit application. "Front yard" is defined as an open space extending the full length of the front lot line to a yard setback distance specified herein for front yards." (ROR 1, p. 2-16.).

A review of the record by the court reveals that the parties did, in fact, identify the location of the front yard through notations on the site plans filed by the plaintiff. While the original site plan submitted by the plaintiff did not have any notations indicating the front, side or rear yard setbacks, the revised site plan dated January 29, 2008 submitted by plaintiff does show the front, side and rear yard setbacks. (ROR 55, p. 3; ROR 57 p.4.) Notably, the front yard setback designated by the plaintiff ran the length of the proposed project that was directly adjacent to Plumtrees Road, as well as the length of the property that was set back, running parallel to Plumtrees Road. The plaintiff's identification of the "front yard" on the site plans was consistent with the definition of "front yard" as defined above. Ms. Emminger's comments in

ROR13, 26 and 37 also do not reveal any confusion on the part of the parties as to what sections of the proposed project constituted the front yard. Moreover, the site plans filed by the plaintiff reveal that additional landscaping was provided in both front yards, ostensibly in response to staff comments, but that the bulk of the landscaping in the front yard was indeed shifted in the January 29, 2008 site plan submitted so that it was no longer located within the proposed project, but instead was located on the Putnam Automotive adjacent property. The court notes for the record that its review of the January 29, 2008 site plan submitted by plaintiff does, in fact, show that the line of trees previously located within the property line was moved so that it was now located outside of the property line, on the property owned by Putnam Automotive. (ROR 57.)

"A special [exception] allows a property owner to use his property in a manner expressly permitted by local zoning regulations. . . . The proposed use . . . must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience, and property values. . . . Acting in this administrative capacity, the [zoning commission's] function is to determine whether the applicant's proposed use is expressly permitted under the regulations, and whether the standards set forth in the regulations and the statute are satisfied. It is well settled that in granting a special [exception], an applicant must satisfy all conditions imposed by the regulations." (Citations omitted; internal quotations omitted.) *MacKenzie* v. *Planning & Zoning Commission*, 146 Conn. App. 406, 441-442, 77 A.3d 904 (2013). In the *MacKenzie* case, the Appellate Court in reversing the Superior Court's decision, recounted that the Superior Court noted "[t]he site plan initially presented to [and ultimately approved by] the commission did not fully comply with the parking, landscaping and buffer requirements in the regulations." Id., 442. The Appellate Court further noted that "at no

point has the defendant disputed that determination. Rather it acknowledged as much in submitting an alternate plan before the commission. Because the plan approved by the commission plainly does not comply with the setback and landscaped buffer requirements contained in §§ 117-1103, 117-1104(B) and 117-105(B) of the regulations, the commission's decision to approve the special exception was improper." Id.

In this case, there was a finding by the defendant Planning Commission that the plaintiff's site application did not conform to the landscaping regulations set forth in § 6.C.2.a (1) of the Danbury Zoning Regulations. The only grounds on which the plaintiff disputes the defendant Planning Commission's decision in this regard is that the defendant improperly designated the 16 Plumtrees Road property as a flag lot. (Pl. 6/7/10 Br. pp. 20-21). For the reasons set forth above, such argument has no merit. Because the plaintiff's site plan application did not comply with § 6.C.2.a (1) of the Danbury Zoning Regulations the defendant Planning Commission's denial of such site plan application on this ground was proper.

Based on the foregoing, the court finds that there is substantial evidence in the record that the landscaping as provided on the January 29, 2008 site plan did not comply with § 6.C.2.a (1) of the Danbury Zoning Regulations. The court also finds that the defendant Planning Commission's denial of plaintiff's site plan application on this ground was based on substantial evidence in the record and that its denial of plaintiff's application was not arbitrary, illegal or an abuse of its discretion. Accordingly, the defendant Planning Commission's denial of plaintiff's site plan application on such grounds is upheld.

B. Commission's Denial of Site Plan Pursuant to § 8.A.2 (c)(4) Danbury Zoning Regulation

The plaintiff next argues that the defendant Planning Commission's denial of its site plan

application on the grounds that the plaintiff failed to comply with § 8.A.2 (c)(4) of the Danbury Zoning Regulations is not based on substantial evidence in the record and must be overturned.

In its denial of the plaintiff's site plan application, the defendant Planning Commission cited the plaintiff's failure to comply with § 8.A.2(c)(4) of the Danbury Zoning Regulations, which provides, in relevant part, that: "the bottom edge of excavations or fill shall be a minimum of five (5) feet from the property line. Fill shall be located so that settlement, sliding, or erosion will not deposit fill on adjoining property" as a grounds for denying the application. The defendant Planning Commission stated "Section 8.A of the City of Danbury Zoning Regulations . . . requires an application for site plan approval to include proper erosion and sedimentation control. . . . Section 8.A.3 of the Regulations requires that no person shall do any grading, stripping, excavating or filling or undertake any earth changes unless a valid erosion and sedimentation control permit is obtained from the City of Danbury Health Director or Environmental Impact Commission. The Planning Commission acknowledges that a permit for regulated activities was issued by the Environmental Impact Commission on February 20, 2007. This approval, however, was not issued on the site plan ultimately submitted by the applicant to the Planning Commission. This last revised plan fails to comply with the grading standards identified in Section 8.A.2(c)(4) of the Zoning Regulations. . . . The location of grading and wall structures on the adjacent site is in violation of this standard. . . . There are no revisions to the site plan that can be made that would render the plan in compliance with the grading standard enabling the City to issue an erosion and sedimentation control permit and at the same time satisfactorily address the comments of City Staff to ensure the safety of those utilizing the site and providing emergency services thereto." (ROR 41, p. 16-17.)

The plaintiff argues that the regulations do not prohibit the obtainment of slope rights or other easements from adjoining property owners and that the defendant Planning Commission could have conditionally approved the proposed project on the obtainment of a new permit from the environmental commission. The plaintiff also contends that the site plan submitted is materially the same site plan approved by the Environmental Impact Commission (EIC) and that the defendant Planning Commission could have conditionally approved the application. The plaintiff further argues that it is outside the jurisdiction of the defendant to police the permit requirements of other commissions.

In its response to the plaintiff's arguments, the defendant Planning Commission simply contends that plaintiff's application was deficient in its omissions and it was not an abuse of the defendant Planning Commission's discretion to not impose a conditional approval. The defendant Planning Commission cites to *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 381, for this proposition. In *Cambodian Buddhist Society of Connecticut, Inc.*, the Supreme Court held: "[a] zoning commission generally is not authorized to grant land use applications conditioned on the approval of another agency over which the commission has no control. . . .This general principle, however, does not apply to applications for special exceptions. . . . In the present case, the trial court concluded that, under *Lurie*, it would have been within the commission's discretion to grant the society's application conditioned on the department's approval of the society's proposed septic and water supply systems, but the commission was not *required* to do so. We agree. Although conditional approvals of applications for special exceptions are permissible, they are not required." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 445-46.

This court finds that defendant Planning Commission had the discretion to deny the plaintiff's site plan application without issuing a conditional approval. Moreover, after reviewing the record it is clear that the plaintiff's permit from the City of Danbury Environmental Commission, was based on a December 29, 2006 site plan. (ROR 2, p. 3) The January 29, 2008 site plan that the plaintiff submitted to the defendant Planning Commission in this case was dated a year later than the site plan submitted to the EIC. (ROR 57.) In addition, the January 29, 2008 site plan that was submitted by the plaintiff states at note 10 that: "[t]emporary grading easements shall be obtained from the abutting property owners . . . prior to applying for a building permit for the retaining wall and prior to the start of construction." (ROR 57, sheet 3) The record also reveals that the limit of the proposed grading was, in fact, outside of the property line of the subject property. (ROR 57.)

The bigger issue at hand, however, which the plaintiff did not raise in this appeal, but which the court has found is § 8.A.2.c (4) of the Danbury Zoning Regulations under the title "Grading Requirements" cited by the defendant Planning Commission in its denial as requiring "the bottom edge of excavations or fill shall be a minimum of five (5) feet from the property line. Fill shall be located so that settlement, sliding or erosion will not deposit fill on adjoining property" did not exist at the time the plaintiff filed its site plan application." (ROR 41, p. 16; ROR 1, p. 8-1.) A review of the record of the Danbury Zoning Regulations in existence at the time the plaintiff filed its site plan application does not contain the grading requirement cited by the Defendant Planning Commission in its denial. (ROR 1, p. 8-1.) The court also notes that § 8.A.3 cited by the defendant Planning Commission in support of its denial also did not exist as § 8.A.3 in the Danbury Zoning Regulation in effect at the time the plaintiff filed its site plan

application. The language of such section, however, was in existence as § 8.A.2. (ROR 1, p. 8-1.) The court could not locate the language contained in § 8.A.2.c (4) in any other section of the Danbury Zoning Regulations in effect at the time the plaintiff filed its site plan application.

Because the plaintiff's site plan application was denied due to the stated failure to comply with § 8.A.2.c (4) of the Danbury Zoning Regulations, a grading regulation that did not exist at the time application was made, the defendant Planning Commission's denial of such site plan application on this ground was not proper.

Based on the foregoing, the court finds that there is not substantial evidence in the record to support defendant Planning Commission's denial of plaintiff's site plan application on this ground and such denial was an abuse of its discretion. Accordingly, the defendant Planning Commission's denial of plaintiff's site plan application on such grounds is overturned.

C. Commission's Denial of Site Plan Pursuant to § 8.B.1.b(1)(a) and 10.D.4.c Regulations

The plaintiff next argues that the defendant Planning Commission's denial of its site plan application on the grounds that the plaintiff failed to comply with § § 8.B.1.b(1)(a) and 10.D.4.c of the Danbury Zoning Regulations is not based on substantial evidence in the record and must be overturned.

In its denial of plaintiff's site plan application, the defendant Planning Commission cited the plaintiff's failure to comply with § 8.B.1.b (1) (a) of the Danbury Zoning regulations which requires that the street providing access to a lot shall be suitably improved to accommodate the amount and types of traffic generated by the proposed use. In its denial the defendant Planning Commission found that "[i]n response to comments raised by the City Traffic Engineer/Traffic Authority, the applicant has proposed to widen Plumtrees Road to allow for a southbound right

turn lane into the site. The area for the proposed widening is shown on the plans as a cross-hatched area with the following note '12' wide right turn lane to be constructed along Plumtrees Road. Proposed lane shall be constructed to conform to all geometric and public improvement standards as set forth by the City of Danbury Engineering Department. As stated the plans fail to provide detailed design information relating to the proposed roadway widening. Said details are required to be submitted and reviewed by City Staff during the course of the site plan review process to ensure that improvements can be constructed, such improvements to be proposed to protect the safety of the motoring public on the adjacent roadways as well as those using the site. The Planning Commission finds that the site plan fails to include specific details of the roadway improvements as required pursuant to § 10.D.4.c of the Zoning Regulations. . . . The Planning Commission finds that the site plan fails to comply with §§ 8.B.1.b (1)(a) and 10.D.4.c of the Zoning Regulations." (ROR 41 p. 17.)

The plaintiff argues that the proposed change to Plumtrees Road is a widening of the road, not a new road, and that the regulations do not require details to be submitted for the widening of existing roads. The plaintiff further argues that details of the construction were provided in its January 29, 2008 site plan. (ROR 57.) Upon review of the January 29, 2009 site plan, however, the only details of construction of the road in question were "12 foot wide right turn to be constructed along Plumtrees Road. Proposed lane shall be constructed to conform to all geometric and public improvement standards as set forth by the City of Danbury Engineering Department." (ROR 57.)

Section 8.B.1.b(1)(a) of the Danbury Zoning Regulations provides, in relevant part: "The street providing access to a lot shall be suitably improved to accommodate the amount and types

of traffic generated by the proposed use. *Turning lanes*, traffic directional islands, frontage roads and traffic controls may be required." (Emphasis added.) The defendant further claims that § 10.D.4.c of the Danbury Zoning Regulations requires construction details to be provided on site plans. In the defendant's Planning Commission's August 16, 2010 brief, the defendant states that § 10.D.4.c of the Danbury Zoning Regulations provides, in relevant part, that an applicant for a special exception shall provide "[c]onstruction details prepared by a licensed professional engineer registered in the State of Connecticut . . . of all proposed (1) roads; (2) bridges; (3) driveways and associated aprons; (4) sidewalks; (5) retaining wall; and (6) curbing." (Def. 8/16/10 Br. p. 23, fn. 15.)

This court discovered once again that the version of §10.D.4.c of the Danbury Zoning Regulations that the defendant Planning Commission based its denial on, was not in existence at the time plaintiff filed its site plan application. (ROR 1, p. 10-9.) Instead, the version of § 10.D.4 of the Danbury Zoning Regulations that was in effect at the time of plaintiff's site plan application provides, in relevant part, that "[p]roposed revisions to any previously approved site plan still in effect shall require the submission of a new site plan which plan shall include all proposed revisions and all other previously approved graphic and written information. . . ." The court notes that § 10.D.4.c of the Danbury Zoning Regulations was subsequently amended to include the language the defendant Planning Commission cites in its brief and relied upon in its denial, but such language was not in existence in § 10.D.4.c at the time the plaintiff filed its site plan application.

Because the plaintiff's site plan application was denied due to the stated failure to comply with § 10.D.4.c of the Danbury Zoning Regulations, a site plan regulation that did not exist at

the time application was made, the defendant Planning Commission's denial of such site plan application on this ground was not proper.

Based on the foregoing, the court finds that the defendant Planning Commission's denial of the plaintiff's site plan application on the grounds it failed to include specific details of the roadway improvements as required pursuant to § 10.D.4.c of the Danbury Zoning Regulations was not based on substantial evidence in the record and the defendant Planning Commission's denial of the site plan application on this ground was an abuse of discretion. Accordingly, the defendant Planning Commission's denial of plaintiff's site plan application on these grounds is overturned.

D. Commission's Denial of Site Plan Pursuant to § 1.D.3 Danbury Zoning Regulations

The plaintiff next argues that the defendant Planning Commission's denial of its site plan application pursuant to § 1.D.3 of the Danbury Zoning Regulations was improper and the decision of the defendant Planning Commission on this ground should be overturned.

In its denial of the plaintiff's site plan application, the defendant Planning Commission held that the plaintiff's application failed to comply with §1.D.3 of the Danbury Zoning Regulations. The defendant Planning Commission stated: "[t]he Commission notes that Sections 16A-91 and 16A-92 of the Danbury Code of Ordinances designate the existing transfer station located at 307 White Street, Danbury CT as the 'designated transfer station' in the 'Greater Danbury area' to which all municipalities belonging to the Housatonic Resource Recovery Agency 'shall cause their acceptable waste to be delivered for transfer' to the regional resource recovery facility. Approval of the Application would allow the location of a transfer station in a place not permitted by City Ordinance. Section 1.D.3 of the Danbury Zoning

Regulations provides, in pertinent part, that '[i]t is not intended by these Regulations to repeal, abrogate, annul, or in any way to impair or to interfere with any existing provisions of law or regulation or covenants or with any rules, regulations, or permits previously adopted or issued pursuant to law, provided, however, that where these Regulations impose greater restrictions than are imposed or required by such existing provisions of law or ordinance or covenants or by such rules, regulations, or permits, the provisions of these Regulations shall control.' The provision of the Zoning Regulations allowing transfer stations in the IG-80 zone upon receipt of special exception approval 'impairs or interferes' with Ordinance § 16A-92, which limits the permissible site of a transfer station to 307 White Street. Accordingly, § 1.D.3 provides a basis for the Planning Commission to deny the petition for special exception and application for site plan approval." (ROR 41, p. 18.)

The defendant Planning Commission further stated: "[a]t the public hearing, the applicant argued that the above ordinances are invalid and unenforceable because they violate the Commerce Clause of the U.S. Constitution (Article I, Section 8, cl.3.) The Corporation Counsel advises the Planning Commission, however, that under the well-settled law of the state, the adjudication of such constitutional issues is beyond the jurisdiction of the Commission. . . . Accordingly, the Planning Commission declines to address this issue." (ROR 41, p. 18.)

The plaintiff in this administrative appeal does not contest the defendant Planning Commission's position that the determination of constitutional issues is outside the commission's jurisdiction. (Pl. 6/7/10 Br. p. 35.) The plaintiff argues, however, that the City of Danbury had an agreement under a stipulated judgment in federal court not to enforce §§ 16A-91 and 16A-92, the Flow Control Ordinances and that such enforcement is improper. (Pl. 6/7/10 Br.

p. 35; ROR 16 (k).) To support its argument, the plaintiff refers this court to ROR 16(k).

Upon review of ROR 16 (k), the court finds that the stipulation referred to by the plaintiff was signed in the *Fusco* v. *City of Danbury* case, Civil Action No. 3:93CV-01767 in late 1994. In reviewing this stipulation, it is unclear whether this stipulation was ever entered as a judgment by the federal court as there is no notation on the stipulation reflecting such entry. In addition, the stipulation states, in relevant part: "[t]he City of Danbury will not seek or attempt to enforce §§ 16A-88 and/or 16A-92 of the Code of Ordinances of the City of Danbury as against the *plaintiff* to the extent that such ordinances mandate or designate that solid waste or recyclables collected within Danbury must be delivered to a specific site for processing or disposal." (Emphasis added.) (ROR 16 (k).) Contrary to the plaintiff's argument on this appeal, the stipulation clearly only applies to plaintiff Peter Fusco and it is not a blanket stipulation by the City of Danbury to not enforce §§ 16A-91 and 16A-92 of the Danbury Zoning Regulations as against any other applicant. Moreover, the stipulation applies to §§ 16A-88 and 16A-92, not §§ 16A-91 and 16A-92 on which the defendant Planning Commission issued its denial. Accordingly, the court finds that the plaintiff's argument with respect to this stipulation is without merit.

Typically, a court will not hear constitutional claims when the case can be decided on non-constitutional grounds. In *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 535 A.2d 799 (1988), the court stated: "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." (Internal quotation marks omitted.) Id., 720.

As the denial of the plaintiff's special permit and site plan applications can be upheld on numerous grounds, the court declines to address the constitutional question raised by the

plaintiff.

E. Commission's Denial of Site Plan on Grounds of Incomplete Application

1. Commission's Denial of Site Plan Based on Grading

The plaintiff next argues that the defendant Planning Commission's denial of its site plan application on the grounds that the plaintiff may not be able to obtain grading rights is not based on substantial evidence in the record and must be overturned.

In its denial of the plaintiff's site plan application, the defendant states that "the site plan identifies several retaining walls that must be constructed to accommodate site development as proposed. . . . On several occasions during the public hearing and in memoranda from the Department of Planning and Zoning, staff raised concerns relative to the proximity of retaining walls and associated grading required to construct said walls to the property line. Staff questioned the feasibility of construction as proposed absent encroachment onto adjacent properties. The applicant testified that grading rights would be obtained as needed. The Planning Commission finds that there is no certainty that the applicant can obtain such grading rights . . . . The Planning Commission has no reasonable basis, based on the record to assume that the applicant can obtain grading rights from adjacent properties, specifically over land owned by the City of Danbury located on the northen border of the developable portion of the lot." (ROR 41, p. 19.) The defendant Planning Commission found that "absent such off-site grading rights the Planning Commission cannot affirm that the site plan as proposed can be constructed or that it adequately protects public safety and welfare." (ROR 41, p. 19.)

The plaintiff argues that any required rights would be obtained, as well as that retaining walls could be constructed on the subject property located at 16 Plumtrees Road without

obtaining grading rights. However, the plaintiff does not cite to any part of the record to support its argument. The plaintiff further contends that there is nothing in the Danbury Zoning Regulations that says that the grading rights must be secured prior to submitting the site plan. The plaintiff further argues that the Planning Commission could not consider the March 4, 2008 report submitted by the Associate Planner for the City of Danbury with respect to this issue as such report was received after the public hearings closed.

On December 19, 2007 and on March 4, 2008, Jennifer Emminger, the Associate Planner for the City of Danbury referenced her concerns regarding the grading rights that the plaintiff needed to obtain from adjacent properties. (ROR 13, p. 5; ROR 37, pp. 6-7.) Specifically, her March 4, 2008 report states that "it is not clear that grading rights will be obtained from adjacent property owners other than the applicant and there is no response from the applicant as to what provisions will be made or undertaken by the applicant should off-site rights be denied. Therefore, the plans as revised are incomplete." (ROR 37, p. 6.)

In its denial, the defendant is clear that it lacks the necessary information as to the certainty that these grading rights will be granted to the plaintiff. Although the defendant could have conditioned its approval on the granting of these rights, it was not required to do so. See, *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 445-46. Further, although the March 4, 2008 report on this issue was submitted to defendant Planning Commission following the close of the public hearings, it does not introduce new evidence, but merely comments upon and analyzes the information that was previously submitted in the record by the plaintiff. The court finds that the defendant Planning Commission properly relied on Ms. Emminger's March 4, 2008 Report. (ROR 37.)

Based on the foregoing, the court finds that the defendant Planning Commission's denial of the plaintiff's site plan application due to the incomplete nature of the site plan application is based on substantial evidence in the record and the denial of plaintiff's site plan application on this ground was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant Planning Commission's denial of the plaintiff's site plan application on this ground is upheld.

2. Commission's Denial of Site Plan Based On Vehicle Storage and Maintenance

The plaintiff next argues that the defendant Planning Commission's denial of its site plan application on the grounds that plaintiff's vehicle storage and maintenance fail to ensure public safety is not based on substantial evidence in the record and must be overturned.

In its denial, the defendant Planning Commission state that the Statement of Operations, submitted by the plaintiff on January 29, 2008, identified the types of equipment that would be necessary for the daily operation of the proposed transfer station, including a wheel loader, a tracked or wheeled excavator, skid loaders and a yard tractor, some of which equipment had not previously been identified by the plaintiff at the public hearings. (ROR 41, p. 19.) The defendant noted that it had concerns based on this submission as to the location of the storage of the equipment and the necessity of maintaining clear access for emergency services purposes. (ROR 41, p. 19.) The defendant Planning Commission further found that "based on information in the record, such issues (i.e. vehicle maintenance activities and the storage location of on site heavy vehicles given the tipping size floor and the site layout) therefore remain unresolved. As such the Planning Commission finds the operation of the use proposed fails to ensure public safety." (ROR 41, p. 19.)

In response, the plaintiff argues that the heavy equipment noted by the defendant

Planning Commission was previously mentioned in the record, and that there was ample storage space for this equipment either in storage bays or on the large open paved area on the east side of the main building.

In the public hearings, the plaintiff's expert discussed two pieces of heavy equipment, a front end loader and a tractor. (ROR 49, pp. 5-14.) However, the expert does not discuss where these pieces of heavy equipment would be stored, which is the defendant's concern in this matter. Further, in Jennifer Emminger, Associate Planner for the City of Danbury's March 4, 2008 Report, she comments on this issue questioning the impacts on on-site flow of traffic if said vehicles are stored outside and questioning how vehicle maintenance as described in the Statement of Operations will be addressed to ensure public safety and to minimize impacts. (ROR 37, p. 11.) Once again, the court finds that the March 4, 2008 report does not add evidence into the record, but merely analyzes and comments on information that is already in the record with respect to this issue. The court finds that the defendant Planning Commission properly relied on Ms. Emminger's March 4, 2008 Report. (ROR 37.)

The court finds that the defendant Planning Commission's denial of the plaintiff's site plan application due to the incomplete nature of the application as it pertains to public safety on this issue is based on substantial evidence in the record and the denial of the plaintiff's site plan application on this grounds was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant Planning Commission's denial of the plaintiff's site plan application on this grounds is upheld.

3. <u>Commission's Denial of Site Plan Based on Storage and Use of Mulch</u>

The plaintiff next argues that the defendant Planning Commission's denial of its site plan

application on the grounds that plaintiff's storage and use of mulch is unresolved and the Planning Commission cannot ensure that the public interest is protected is not based on substantial evidence in the record and must be overturned.

The defendant Planning Commission states in its denial that the Statement of Operations, submitted by the plaintiff on January 29, 2008, mentions for "the first time that a six inch layer of mulch will be placed on top of the transfer trailers containing municipal solid waste that is not slated for immediate removal from the site. Use of mulch is intended to reduce odor impacts. The applicant also indicated that the trailers would be covered in a canvas material. Transfer trailers will be stored and parked on-site in the designated area as shown on the site plan, west of the facility building. The applicant, has not, however, specified a time restriction on the storage of such filled transfer trailers. . . . The storage of mulch on the project site and its use for operational purposes is unresolved. Based on this, the Planning Commission cannot ensure that the public interests are protected." (ROR 41, p. 20.) The defendant Planning Commission expressed concern over the quantity of mulch intended to be stored, the storage, location and the potential impacts associated with a pile of decomposing wood.

In response to the denial on these grounds, the plaintiff argues first that it stated at the public hearing that it had no incentive to store mulch on site and made it clear that no materials would remain on site for a day. (ROR 49, p. 15; ROR 50, p.42.) The plaintiff further argues that if the defendant Planning Commission was worried about the storage of the mulch it could have imposed a condition of approval requiring the mulch to be stored indoors or in covered containers.

The court's review of the record shows that the Statement of Operations filed by the

plaintiff does state that a six inch layer of mulch will be placed on the top of any trailers with waste that is not slated for immediate removal. (ROR 29, p. 13.) While the use of mulch is discussed previously in the record, at ROR 51, p. 42, and at ROR 30, Exh. S, the amount of mulch to be used was not disclosed until the plaintiff submitted its Statement of Operations. Further, nowhere in the record is there a discussion of where the mulch that will be used for these purposes will be stored. The March 4, 2008 report by Jennifer Emminger, Associate Planner for the City of Danbury, comments on this omission in her report.(ROR 37, p. 11.) Once again, the court finds that the March 4, 2008 report does not add evidence into the record, but merely analyzes and comments on information that is already in the record with respect to this issue. The court finds that the defendant Planning Commission properly relied on Ms. Emminger's March 4, 2008 Report. (ROR 37.)

As to plaintiff's argument that defendant could have conditioned approval on requiring the mulch to be stored indoors or in covered containers, the Supreme Court has held that although a defendant planning commission could have conditioned its approval on the granting of certain rights or conditions, it was not required to do so. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 445-46.

Based on the foregoing, the court finds that the defendant Planning Commission's denial of the site plan application due to the incomplete nature of the application as it pertains to public safety on this issue was based on substantial evidence in the record and such denial was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant's denial of the plaintiff's site plan application on these grounds is upheld.

4. Commission's Denial of Site Plan Based on Extended Hours of Operation

The plaintiff next argues that the defendant Planning Commission's denial of its site plan application on the grounds that plaintiff may have extended hours of operation is not based on substantial evidence in the record and must be overturned.

The defendant Planning Commission states in its denial that while previous testimony from the plaintiff indicated that the hours of operation of the waste transfer site would run from 6 a.m. until 4 p.m., the Statement of Operations submitted by plaintiff on January 29, 2008, for the first time "indicated that waste loading, out-shipment and miscellaneous facility housekeeping hours may extend beyond the waste receiving hours to account for time necessary for daily preparation, materials processing and end-of-day maintenance and clean up activities. The Planning Commission finds that the provision of this new information raises significant issues of concern relative to site operations associated with the proposed special exception use that have not been fully evaluated. Comments of the Planning Commission and staff cannot be addressed by the applicant nor resolved to the satisfaction of the Planning Commission as the public hearing on the Application is closed. Due to the absence of responses to comments on new information presented by the applicant, the Planning Commission cannot find that the use protects public welfare and safety." (ROR 41 p. 20.)

In response, the plaintiff argues that this extension of hours was always contemplated and was disclosed to the defendant at ROR 49, p. 14, and in the Statement of Operations dated January 29, 2008 ROR 29 p. 4.

A review of the record by the court reveals that at ROR 49, p. 14, the plaintiff's expert states: "The hours of operation for the facility are six a.m. to four p.m. for receiving materials. . .

. And the staff may leave within an hour or two of the last cessation of receipt of materials." In addition, during the public hearing on December 17, 2007, Michael Galante, the plaintiff's traffic expert, testified with regard to traffic issues that: "Plumtrees Road carries six hundred-ninety vehicles, two-way volume, during that time period. That five-to-six, that's important time because this facility will be closed at four o'clock p.m." (ROR 49, p. 41.)

Further, during the public hearing on January 2, 2008, the following exchange took place between the plaintiff's traffic expert David Brown and board member K. Keller:

"Q: There was some mention in the testimony the last time about there would be, the facility would close like 4 p.m. and there would be trucks leaving until when, 6?
"A: I believe Mr. Putnam testified that the facility would be closed, lights out by 5:00. That's my recollection." (ROR 50, p. 27.)

The defendant Planning Commission based its denial on this issue on the fact that the extended hours of operation was new information presented to the defendant after the close of the public hearings to which it had no ability to get responses to its concerns relative to site operations. The record reveals, however, that this is not the case. On two occasions, though the exact times discussed are not consistent, extended hours past 4 p.m. were discussed.

Based on the foregoing, the court finds that the defendant Planning Commission's denial of the plaintiff's site plan application due to the incomplete nature of the application as it pertains to public safety on this issue was not based on substantial evidence in the record and such denial was an abuse of discretion. Accordingly, the defendant's denial of the plaintiff's site plan application on these grounds is overturned.

5. <u>Commission's Denial of Site Plan Based On Extended Storage of Transfer Trailers</u>

The plaintiff next argues that the defendant Planning Commission's denial of its site plan

application on the grounds that plaintiff may have extended storage of transfer trailers is not based on substantial evidence in the record and must be overturned.

In its denial, the defendant Planning Commission states that in the Statement of Operations submitted by the plaintiff on January 29, 2008, the plaintiff "indicates that Bulky waste and C & D debris will be received, sorted and recoverable items separated for diversion from the disposal stream. Markets for recovered materials are expected to change from time-to-time. . . . Recovered items will be removed and placed into containers. The applicant did not provide testimony regarding the length of time such materials would be stored on-site pending removal to off-site locations or markets. . . . Based on this vague description in the Overview of Operations, page 8 of Statement of Operations, the Planning Commission notes its concern relative to the length of time the materials will be stored on site and the impacts associated with such storage requirements. . . . Absent resolution of these issues, the Planning Commission cannot ensure the use and site plan adequately protects the public welfare and safety." (ROR 41 p. 21).

The plaintiff argues in response that it did indicate on the record at ROR 50, p. 38 the anticipated timing of storage and that these were not waste products the plaintiff was seeking to handle, but consist of items it may encounter in the waste stream. (ROR 49, p. 5.) The plaintiff argues that these items consist of such things as metals, untreated wood, painted and treated wood, cardboard and fibers, inert material such as block, brick, masonry and such other items as the Department of Environmental Protection has determined to be inert and not a source of pollution. (Pl. 6/7/10 Br. p. 32.) The plaintiff argues that the storage of material such as this does not cause concern to public health and safety.

The court's review of the record reveals that during the public hearing on December 17, 2007, the plaintiff's engineer, David Brown, testified: "[t]he material on the tipping floor is to be examined by the operating staff; there may be a limited amount of recovery of material. . . ." (ROR 49, p. 5.) On January 2, 2008, Mr. Brown testified regarding the storage of clean wood, another recoverable material, stated that it would be stored outside and could be stored there up to two weeks. (ROR 50, pp. 37-38.) The other recoverable items; i.e. metals, block, bricks, etc. cited above by the plaintiff in its brief were not found in the record.

The defendant has based its denial on this point on a lack of information as to where the recoverable materials would be stored and for how long. The court's review of the record reveals that there is information in the record regarding the location and duration of the storage for clean wood, but no information regarding where the other recoverable materials could be stored and for how long. In its denial, the defendant Planning Commission cites concerns regarding this issue as to whether storage slots in the northwest corner of the site would need to be utilized for extended periods of time, that could limit or restrict the storage of transfer trailers containing municipal solid waste. (ROR 41, p. 20.)

Based on the foregoing, the court finds that the defendant Planning Commission's denial of the plaintiff's site plan application due to the incomplete nature of the application as it pertains to public safety on this issue was based on substantial evidence in the record and such denial was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant's denial of plaintiff's site plan application on these grounds is upheld.

6. Commission's Denial of Site Plan Due to Site Plan of 14 Plumtrees Road

The plaintiff next argues that the defendant Planning Commission's denial of its site plan

application on the grounds that it deemed site plan revisions to 14 Plumtrees Road necessary is not based on substantial evidence in the record and must be overturned.

In its denial, the defendant Planning Commission states that the revised site plan submitted by the plaintiff on January 29, 2008, reveals changes that would affect the adjacent property, Putnam Automotive, located on 14 Plumtrees Road. (ROR 41, p. 21.) The defendant Planning Commission noted that the owner of Putnam Automotive is the applicant/agent for the plaintiff. (ROR 41, p. 21.) Notwithstanding that fact, the defendant Planning Commission found that "the modifications to the 14 Plumtrees Road site layout that resulted from revisions on the 16 Plumtrees Road site mandated a submission of a revised site plan for 14 Plumtrees Road. An application for a revised site plan approval has not been submitted to the City of Danbury for review or approval. Therefore, the Planning Commission cannot determine whether the modifications proposed as part of the Application are in conformance with the Zoning Regulations relative to 14 Plumtrees Road site or if such modifications render that site non-conforming. Whether the existing use of 14 Plumtrees Road as an automotive collision and repair facility can continue to operate in a manner that protects the public health, welfare and safety remains unresolved and therefore the Application is incomplete." (ROR 41, p. 21.)

The plaintiff argues in response that site plan changes to the adjacent property located at 14 Plumtrees Road that may affect 16 Plumtrees Road' compliance with the Danbury Zoning Regulations is not a basis upon which the defendant may deny the plaintiff's application. (Pl. 6/7/10 Br. p. 33.) The plaintiff further contends that if the defendant Planning Commission needed a revised site plan from 14 Plumtrees Road, it did not have to close the public hearings and could have extended such hearings to get a revised site plan. (Pl. 6/7/10 Br. p. 33.) The

plaintiff further submits that if the site plan changes to 16 Plumtrees Road which affect 14 Plumtrees Road, resulted in 14 Plumtrees Road's property becoming non-complying, the plaintiff could delay implementation of its permit pending resolution of non-compliance.

In response, the defendant Planning Commission calls the plaintiff's argument, that potential site plan deficiencies on adjoining 14 Plumtrees Road, which would result from necessary spill-over development from 16 Plumtrees Road, provide no basis for denying the application "bizarre". (Def. 8/16/10 Br. p. 33.) The defendant Planning Commission further argues that it correctly pointed out the deficiencies in the application and it should be upheld on this ground.

As the defendant Planning Commission is the regulatory body that is charged with ensuring that both parcels are in compliance with the regulations, its uncertainty as to whether 14 Plumtrees Road would, in fact, be able to accommodate the changes proposed by the plaintiff's site plan for 16 Plumtrees Road and still be in compliance is a legitimate concern. The court's review of the record reveals that there is no evidence in the record regarding the ability of 14 Plumtrees Road to grant the rights noted on the site plans. Accordingly, the defendant Planning Commission properly denied the plaintiff's site plan application due to the lack of information on this issue.

Based on the foregoing, the court finds that the defendant Planning Commission's denial of the plaintiff's site plan application due to the incomplete nature of the application as it pertained to 14 Plumtrees Road was based on substantial evidence in the record and such denial was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant's denial of the plaintiff's site plan application on these grounds is upheld.

7. **Commission's Denial of Site Plan Due to Site Plan Inconsistency With EIC Submission**

The plaintiff next argues that the defendant Planning Commission's denial of its site plan application on the grounds that the site plan submitted to the defendant on January 29, 2008, was not the same site plan submitted to the City of Danbury Environmental Impact Commission (EIC) in December 2006, upon which the EIC permit was issued, is not based on substantial evidence in the record and must be overturned.

In its denial, the defendant Planning Commission states that the "applicant submitted revised drawings to the Planning Commission on January 29, 2008. These revised plans vary from those upon which the EIC permit was issued, specifically details related to site grading, driveway design and width, landscaping, and location of retaining walls. The permit specifically indicates that "any developmental activities other than that shown on the approved site plan are subject to further review and approval by the Danbury Environmental Impact Commission. Therefore, the issues surrounding the validity of the permit are unresolved." (ROR 41, p. 21.)

The plaintiff contends that this was not a proper grounds for denial because, although inconsistencies in the site plan may have required an amendment to the site plan either before one commission or another, it was outside the jurisdiction of the defendant Planning Commission to police permit requirements of other commissions. (Pl. 6/7/10 Br. p. 34.) Notwithstanding that argument, the plaintiff contends that in any event, the inconsistencies were slight and not material to the EIC approval and such inconsistencies do not constitute substantial evidence to support a denial of its site plan application. (Pl. 6/7/10 Br. p. 34.)

The plaintiff addressed this argument earlier in its administrative appeal with respect to the issues of erosion and sedimentation controls and the site plan submitted to the EIC in

December 2006. In that portion of its brief, the plaintiff argued that the defendant Planning Commission could have imposed a condition of approval that the approved site plan provide for all construction to be on the plaintiff's property at 16 Plumtrees Road "unless or until appropriate slope right easements and any required modifications to EIC approval were obtained to construct the conventional alternative." (Pl. 6/7/10 Br. p. 22). The plaintiff did not argue in that section of its administrative appeal that the difference in the site plan submitted to the EIC in December 2006 was "inconsequential and immaterial" to the changes made in the January 29, 2008 revised site plan submitted to the defendant Planning Commission.

In *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 445-46, the Supreme Court held: "[a] zoning commission generally is not authorized to grant land use applications conditioned on the approval of another agency over which the commission has no control. . . .This general principle, however, does not apply to applications for special exceptions. . . . In the present case, the trial court concluded that, under *Lurie*, it would have been within the commission's discretion to grant the society's application conditioned on the department's approval of the society's proposed septic and water supply systems, but the commission was not *required* to do so. We agree. Although conditional approvals of applications for special exceptions are permissible, they are not required." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id.

The defendant Planning Commission was under no obligation to condition its approval of the plaintiff's site plan application on the EIC's issuance of a permit based on the revised site plan filed by the plaintiff on January 29, 2008. Further there is no dispute that the site plan that the plaintiff submitted to the EIC in December 2006 was not the same site plan the plaintiff

submitted to the defendant Planning Commission on January 29, 2008 and that the EIC permit issued was not based on the site plan before the defendant Planning Commission

Based on the foregoing, the court finds that the defendant Planning Commission's denial of the plaintiff's site plan application on the grounds that the revised site plan filed on January 29, 2008 was not the before the EIC when it issued its permit for the subject property was based on substantial evidence in the record and such denial was not arbitrary, illegal or an abuse of discretion. Accordingly, the defendant's denial of the plaintiff's site plan application on these grounds is upheld.

V

CONCLUSION

As set forth extensively above, many of the reasons for the defendant Planning Commission's denial of the plaintiff's special permit and site plan applications were based on substantial evidence in the record. This court also found with respect to such denials substantiated by substantial evidence in the record that these denials were not arbitrary, illegal or an abuse of discretion. "The [zoning board's] action must be sustained if even one of the stated reasons is sufficient to support it." (Internal quotation marks omitted.) *Torsiello* v. *Zoning Board of Appeals*, supra, 3 Conn. App. 50. Accordingly, as more than one of the stated reasons by the defendant Planning Commission is sufficient to support the defendant's denial of the plaintiff's special permit and site plan applications, the defendant's denial of such applications is upheld.

OZALIS, J.